THE CONVEYANCER AND PROPERTY LAWYER

VOL. 23, No. 1 JANUARY—FEBRUARY, 1959

CONVEYANCER'S NOTEBOOK

THE USE CLAUSE IN LEASES

The Victorian conveyancer seemed to be obsessed with the picturesque occupations of fellmonger, knacker, glue maker, bone boiler, and so on: he excluded these but usually left the lessee the more lucrative professions and trades of bookmaker, cement broker and restaurateur. During the heyday of the Rent Acts the draftsman was concerned to prohibit the demised premises from being used for sleeping in, only to be thwarted if the premises included what was manifestly residential accommodation. An ill-digested Planning Act changed the style and the tendency was to specify the user with some precision. The Landlord and Tenant Act, 1954, has added other traps for the unwary.

The user clause in a lease requires more consideration than it usually receives. From the lessee's point of view, regard must be paid to the possibility of assignment. If premises can only be used for the sale of adding machines, the market for the lease may be negligible. It is true that most lessors would agree to some other more popular use, and cannot, in general, require a premium for such consent (Landlord and Tenant Act, 1927, s. 19 (3)), but there is no way of compelling their consent; and there are loopholes in section 19 (3). Even the lessor runs a risk with too narrow a user clause. In one case recently, a lessor agreed to renew a lease with a narrow user clause but could not agree the rent with the lessee. The matter came before the court under the Landlord and Tenant Act, 1954, and the county court judge pointed out that by reason of the restrictions on user the appropriate rent was less than it might have been without the restriction.

In drawing a user clause the lessor can obtain protection against unwanted development by prohibiting development within the meaning of the Town and Country Planning Act, 1947. Indeed, it has been suggested that this amounts to waste, for which the lessee is liable even without the prohibition. At the very least, if the user is precisely defined, there should be provision that the lessor's consent to change of user should not be unreasonably withheld. The type of case where fairly strict limitation of user may reasonably be required is where an owner of a block of shops sets out to secure healthy development by a variety of trades in the block.

We may, perhaps, mention another snare to be avoided, the accidental business lease. If a lessor lets a dwelling-house and does not prohibit its ancillary user for the purpose of the lessee's profession, he may find that the premises are brought within the Landlord and Tenant Act, 1954. True, the part used for professional purposes may be so small that the lessor could never hope to get a new lease of any use to him because of the exclusion of the residential part—though this could be two-edged—but the lessor would have to serve his statutory notice to terminate.

An Unusual Easement

The English are indeed a law-abiding race. In the property register of a title we came across recently appeared the solemn entry that by a certain transfer "a right is expressed to be reserved for the benefit of the land in this title to pass on to the roof of any house erected on the land thereby transferred for the purpose of escape in the event of fire." The mortgagee's solicitors, apparently not content with the terms of the entry, insisted on a complete copy of the transfer granting the right. Did they expect to find a clause requiring the owner of the dominant tenement to be properly attired and to raise his bowler hat or coke when exercising the right? And if there had been, would there have been further requisitions on the mortgagor's wardrobe?

HOUSING ASSOCIATIONS

By J. C. Craddock, b.a.
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Housing associations (or societies) have been described as the Light Cavalry of those forces in the country which provide housing accommodation for letting. In that the associations have been (and still are) pioneers in this field, and because of their adaptability to circumstance, the description is apt. They are voluntary non-profit-making bodies which have their tenants' well-being as their first concern and they vary in size and scope, providing accommodation at as reasonable a rent as possible both by new building and by the conversion and improvement of existing building. There are probably 750-odd housing associations in being in the country at the present time. Many members of the legal profession will come across them at one time or another and to these the following notes may be of interest.

1. Origin and Early History

Housing associations or societies (the terms are used synonymously in this article) had their origin about the middle of the last century when they were concerned with improving the conditions under which the poorer classes lived in London and the large provincial cities, by building blocks of flats to let at low rentals. At this time the population of the country had doubled in less than a hundred years and the Industrial Revolution had led to concentrations in the urban areas. Central and local governments were not sufficiently prepared to face the problem and it was left mainly to speculative builders to provide the dwellings which the workers needed in the new areas, dwellings which, cheaply and quickly put up, soon developed into slums of the worst kind.

The first housing society on record, the Society for Improving the Condition of the Labouring Classes, began its housing work in 1844, having been originally established as the Labourer's Friend Society in 1830. This Society flourished under Royal patronage and was granted a Royal Charter in 1850, the Prince Consort becoming its first President. The interest shown in the plans and models of the Society's improved dwellings at the Great Exhibition in 1851 and the immunity of its tenants from the cholera outbreaks of 1849 and 1854 did much to encourage the formation of many other

societies both in this country and abroad with similar objects, those of adopting better housing standards and improved sanitation. This voluntary Society, its earliest properties being financed by public subscription, survives today and it takes pride in continuing to provide a useful service even in the days of a Welfare State.

Thus the voluntary housing society movement anticipated by a good many years the first housing legislation of the Victorian era, the Artizans and Labourers Dwellings Act, 1868, and the Artizans and Labourers Dwellings Improvement Act, 1875, which were the first official remedial measures to deal with slum clearance. Mention of this Act of 1875 brings in the name of Octavia Hill, a remarkable pioneer of the voluntary housing movement and of enlightened relationship between landlord and tenant, *i.e.*, "housing management." It was largely due to Octavia Hill that the Act of 1875 was brought in. It is worthy of notice that these early efforts were not wholly charitable but that economic rents were charged, sufficient, with good management, to give a small but reasonable return on the capital provided, although this was subscribed by invitation and not from Government sources.

Such investment capital was not readily forthcoming however and the latter part of the century saw the creation of several housing trusts which were endowed by prominent industrialists, whose names many of the trusts bear. In 1889 the Guinness Trust was formed with an endowment of £200,000 given by Sir E. C. Guinness (the first Earl of Iveagh) the principal object being the provision of improved dwellings to let at rents within the means of the lowest wage earners, but returning a fair, low rate of interest. The founders further laid down that the surplus each year was to be added to the original capital fund and used for further expansion (*a*). Other well-known trusts in this category are the Peabody Donation Fund, Sutton Dwellings, Bournville Estates, and those connected with the firms of Joseph Rowntree and others.

Early in the present century the housing association movement took part in the building of the garden cities at Letchworth and Welwyn, and also in the creation of those communities, which, being zoned for industrial and residential purposes, were the forerunners of the present more ambitious new towns.

Official Recognition—Public Utility Societies

The main purpose of the Acts of 1868 and 1875 mentioned above was to enable local sanitary authorities to clear away the slums and

(*a*) As at December 31, 1957, the capital fund of the Guinness Trust amounted to over £1,500,000 and the Trust had 3,669 dwellings in London housing a total of 8,006 persons.

build in their stead small houses for members of the working classes which could be built cheaply and still to a certain standard. It was not until after the First World War however that it was acknowledged that the burden of providing this accommodation had grown to such an extent that it was beyond the power of local authority financial resources. The Housing, Town Planning, etc., Act, of 1919, following on the Housing and Town Planning Act of 1909, therefore, provided for assistance to be given by the central government: in other words the principle of an Exchequer housing subsidy was introduced, and long-term loans for housing from the Public Works Loans Commissioners were available. What was most important was that similar facilities were accorded to housing associations, which then became officially recognised, but under the name, then, of Public Utility Societies, a title they bore for some years.

Later Housing Acts which followed in the 1920s and early 1930s consolidated the position of housing associations as ancillaries to local authorities in the field of housing.

Housing Act, 1936

In this consolidating Act (*b*) a housing association is defined as, " A society, body of trustees or company established for the purpose of, or amongst whose objects or powers are included those of, constructing, improving or managing or facilitating or encouraging the construction or improvement of, houses, being a society, body of trustees or company who do not trade for profit *or* whose constitution or rules prohibit the issue of any capital with interest or dividend exceeding the rate for the time being prescribed by the Treasury, whether with or without differentiation as between share and loan capital."

The word " or " has been purposely italicised for the purposes of this article to indicate that the definition can be regarded as being in the form of two alternatives, the word " or " having a disjunctive, rather than a conjunctive meaning. This is important as the " rate of interest prescribed by the Treasury " has been fixed at 5 per cent. since 1934, and an anomaly arose when, owing to high interest rates recently, a housing society found itself obliged to pay as much as 7 per cent. on money borrowed from public funds. The alternative " non-profit-making " nature of the housing society solved the problem and the Registrar of Friendly Societies, though not willing to dispense with a limit of interest rates in the case of

(*b*) As amended by the Housing Act, 1949. Now the Housing Act, 1957, s. 189(1).

Industrial and Provident Societies, agreed to a formula " 5 per cent. or 1 per cent. above bank rate whichever was the higher " and was, moreover, willing to exclude from the restriction loans to housing societies from local authorities or building societies or by way of bank overdraft.

In 1936 it is estimated that there were 75 housing associations in existence and the Government recognised their importance to the extent of making provision for statutory recognition in section 96 of the Act (*c*), for any central organisation which might be formed to advise and assist them and to co-ordinate their activities. The National Federation of Housing Societies, which is such a central organisation, was therefore set up at this time, partly at the request of the (then) Minister of Health, to take over the work previously carried out by the Garden Cities and Town Planning Association. Today the Federation has 636 members housing societies, which represent the large majority of such societies in the country taken together with the charitable housing trusts.

2. Housing Societies 1936–54

Activities

During these years the housing society movement increased rapidly, except for an intermission during the 1939–45 war. Their main contribution was the provision of housing accommodation to let for those in need of such accommodation who were not eligible for local authority houses or who were unable to purchase houses themselves. The movement has worked in co-operation with, and supplementary to, the local authorities in whose areas it operates.

Thus, housing society machinery has been used to provide accommodation for, amongst others, the following categories of persons:

(a) *Special Classes.* A housing association can be formed by social or religious groups of people who are interested in meeting the urgent need for accommodation of particular sections of the community, such as the aged, the single and the disabled. A number of associations has provided flatlets, houses, hostels and bungalows to meet this need, giving residents the opportunity for companionship with independence.

(b) *General Families.* An association can be formed by those who, though not requiring houses for themselves, are concerned with the general housing needs of their neighbourhood and see the advantages of housing association machinery and financial facilities

(*c*) Now the Housing Act, 1957, s. 124.

as a means of carrying out a particular housing project. The earlier associations were almost wholly of this type.

(c) *Industrial Workers.* In order to house their employees, especially when their factories are situated in isolated districts, many industrial firms find housing association machinery particularly suitable—for example, the British Airways Staff Housing Society, William Clowes & Sons Housing Society, and those societies promoted by English Electric Co., Ltd., United Steel Co., Ltd., S. Smith & Sons (England), Ltd., and many others. Of recent years, the industrial type of housing association has greatly increased in numbers and importance.

(d) *Self-help Builders.* The formation of a housing association has been found appropriate for groups of men who, realising the shortage of skilled workers in the house-building industry and the length of the local council's waiting list of applicants for houses, wish to build houses for their own occupation with their own labour in their spare time.

(e) *Tenant Co-operatives.* Prior to 1939, a number of housing associations were formed to provide houses which they let to members sharing in collective management. In recent years an increasing number of associations operates on this basis, and persons wishing to house themselves can do so by this means.

Status

Most housing societies achieve recognition by registration under the Industrial and Provident Societies Act. This is a cheap and convenient method and is, normally, preferable to registration under the Companies Acts. Company registration is, however, permissible, as the definition quoted above shows, and there are many other housing societies which are constituted as charitable housing trusts or which have special constitution, as, for instance, by charter. Since most associations exist to meet a local housing need, they usually operate in the localities in which they are formed, although there are some which operate on a county, regional or national basis. The rules of a society provide for direction and continuity in the work to be undertaken by a democratically elected committee of management and the constitution may also enable tenants to provide or share in the management of the houses in which they live, and thus a real community spirit is a common feature of estates built by many housing associations. Registration of a housing society under the Industrial and Provident Societies Act is one of the services undertaken by the National Federation of Housing Societies.

Financial facilities

It is in the field of new building of houses or blocks of flats that housing societies have mainly occupied themselves in the years under review in this part of the article, and, in this field, a local authority has had permissive powers to assist them by making long-term mortgage loans (60 years) and by passing on Exchequer subsidies comparable to the subsidies they themselves can receive for council houses. As is generally known, subsidies have now been virtually abolished in recent years, except in special cases including a subsidy of £10 for a one-bedroom dwelling, which is still available to a housing society. Mortgage loan facilities for new building still exist however and these are still being used in spite of credit-squeeze restriction. It is necessary to mention that some housing societies have been able to borrow money from building societies for their capital needs; the Co-operative Permanent Building Society notably has lent to a considerable number of the self-build societies.

Apart from new building, many housing societies have taken advantage of the provisions of the Housing Act, 1949 (*d*), to undertake work of conversion and improvement of existing properties with the aid of improvement grants and mortgage loans.

Housing Repairs and Rents Act, 1954

Prior to this Act, housing society property was controlled by the Rent Restriction Acts, but section 33 of the 1954 Act gave them the exemption for which the National Federation had campaigned for many years. In view of the Rent Act, 1957, the importance of this concession has been overshadowed but, at the time, it was a manifestation of the trust which the Government placed in the housing societies, as being good landlords. Since the 1954 Act the Federation has been at pains to clarify certain aspects of the exemption and will be willing to give advice on any points of difficulty.

3. Housing Societies 1954–58

Co-operative Housing Societies

An article describing a most interesting example of the work of a group of people in forming a housing society in order to overcome difficulties caused by the Rent Act, 1957, by acquiring the dwellings in which they themselves live is to be published in a subsequent issue of this journal. This is an interesting example of

(*d*) Now the Housing (Financial Provisions) Act, 1958, Pt. II.

a recent 100 per cent. tenant-co-operative housing society. Another recent example is in Regent's Park Road, London, where a group of ten people procured the new building of a fine block of flats in which they themselves now live. They formed a housing society in order to do this and were able to receive financial assistance from St. Pancras Borough Council.

Self-Build Societies

The outstanding example of 100 per cent. co-operative endeavour in housing society work has, however, been the self-build movement. These self-build societies have been briefly mentioned earlier in the article but the last four years has seen the completion of many of their schemes and the formation of many other similar societies which are now trying to emulate the success of the earlier ones. The self-build societies are groups of men, preferably groups with a proportion of skilled building workers amongst them, who are willing to give up their spare time for $2\frac{1}{2}$–3 years in order to build houses for their own occupation with their own voluntary labour. They have been able to receive financial assistance from local authorities and building societies and have been able to build houses which have a value roughly twice their cost, if the labour is put in free.

Special categories

In recent years also the versatility of the housing society movement has enabled it to concern itself with the housing needs of " new-comers "—coloured immigrant workers, Hungarian refugees, and expellees from Egypt. Housing societies have been formed in Leeds, Birmingham, Nottingham, Bristol and London to help the coloured workers, and the B.C.A.R. Housing Society has had considerable success in acquiring dwellings for Hungarian refugees. All this work is continuing and expanding.

General

Economic conditions—credit squeeze, high interest rates, reduction of subsidies—have had their effect on housing society expansion during the last few years. New building, for which there has still been a great need from industrial, and general family, housing societies in particular, has slowed down. There has however been a continuation of work of conversion and improvement of existing buildings, not only for the special categories mentioned above, but also for the needs of old people.

4. REFERENCE

The National Federation of Housing Societies has its offices at 12, Suffolk Street, Pall Mall, London, S.W.1 (telephone: WHItehall 1693). It is in close contact with the Ministry of Housing and Local Government and with many local authorities, and can undertake to answer any questions and give advice generally. It publishes a *General Pamphlet on Housing Societies* (price 2s. 6d.), a small pamphlet entitled *Housing the Elderly* (6d.) and a leaflet on " Self Build " (6d.). It also issues a Quarterly Bulletin for its member societies and circulates them from time to time concerning new legislation. Apart from ordinary full membership enjoyed by housing societies, there is also associate membership which is available to individual subscribers and firms and this is suitable for those who wish to keep in touch with the housing association movement, although not connected with any particular association. Associate members do not enjoy voting rights in the Federation; the fee is £1 1s. per annum.

COMPENSATION TO BUSINESS TENANTS

By J. Montgomerie, Barrister-at-Law

If the tenant of business premises is refused a new lease on the ground that the landlord intends to reconstruct the premises (or on one or two other grounds) he is entitled to compensation equivalent to once or twice the rateable value according to the length of time that the business has been carried on. The machinery for obtaining this compensation is unfortunately cumbrous and it lends itself to abuse on both sides.

Suppose, for example, that the landlord in December, 1958, served a notice terminating the tenancy on June 24, 1959, and stating that he will oppose an application for a new tenancy on the ground that he intends to reconstruct the premises. The tenant may satisfy himself that this intention is genuine but if he simply makes other arrangements and quits the premises in June, 1959, he will obtain no compensation. Unless the landlord agrees to pay compensation out of court, the tenant must first within two months serve a notice saying that he does not intend to give up possession —a lie; then, within four months of the landlord's notice he must file his application for a new lease, an application which he knows to be hopeless. Then when it is duly dismissed, he asks the court for a certificate as to the grounds for dismissal; and, finally, when he quits the holding he makes his claim for compensation. It is not clear who pays the costs of this needless rigmarole, the landlord who refused to agree to pay the compensation without proceedings or the tenant who brought an unsuccessful application for a new lease but had to do so to obtain compensation. But both parties can turn this absurd procedure to their advantage if they are not too troubled by consciences.

The tenant will find that he obtains a useful extension of his lease at the old rent if he plays his cards aright. He brings his application in April, 1959, just within the four months. A hearing date is not likely to be fixed in the county court before June, 1959. In the High Court things may take even longer. At the hearing the tenant politely submits to judgment and finds that his tenancy is automatically extended by section 64 until three months after the hearing date. If he has put up a fight, he gets a further twenty-one days (or six weeks if the hearing was in the High Court) as the three months will not run till the time for appealing has

expired. He may even buy further time by launching an appeal. The tenancy will then be extended until three months after the appeal has been disposed of and any further right of appeal has gone (*a*). Faced with such delaying tactics, which up to a point cannot be criticised, the landlord, if he is anxious to get on with his reconstruction, may well pay more than the statutory compensation to get the tenant out.

The landlord also has some tricks up his sleeve. He does not consent to pay the compensation out of court, so the tenant brings his application. But the landlord, having ascertained that the tenant has already taken a lease of new premises, puts in an answer saying that he does not oppose the grant of a new lease. This is a gamble, for the tenant might go on with his application just to spike the landlord's guns; but, more probably, not wanting two leases on his hands he may be glad to withdraw his application.

A different situation arises where the landlord never really intends to demolish the premises but, wishing to get the tenant out, serves a notice saying that he will oppose a tenancy on this ground. If the tenant persists with his application, again the landlord will not in fact oppose it; he will have lost nothing. But once more the tenant may not wish to have the lease if he has found other accommodation. Thus the landlord will have obtained possession with no liability for compensation.

What counter-ploys are available against these essays in one-upmanship? First, the tenant's delays. The landlord cannot prevent the tenant from making his application even by offering to pay the compensation out of court. For the tenant is entitled to have the landlord's intentions strictly proved. But if an appeal is brought which clearly has no arguable point in it and the landlord can satisfy the court that it is not brought in good faith but just to gain time, he might apply to the Court of Appeal to have it struck out as an abuse of the process of the court. The legal advisers, if any, of the tenant might also find themselves subjected to disciplinary action. The Court of Appeal on an application to strike out or stay an appeal would probably invite the tenant or his counsel to state shortly the nature of the case to satisfy themselves that there was an appealable issue. The landlord can also mitigate the effects of this sort of abuse by serving his notice in good time. But if he serves it too soon, he may not have acquired the necessary fixed and settled intention.

Where it is the landlord who is bluffing, then if he in fact is anxious to reconstruct the premises, the best way to deal with him

(*a*) See *Re No. 20 Exchange Street, Manchester* [1956] 2 All E.R. 509 and further proceedings [1956] 3 All E.R. 490.

will be to press on with the application for a new lease. If one is granted the tenant, even if he cannot make use of it, will perhaps be able to assign it. And the landlord is more than likely to be willing to settle in the corridor by paying more than the statutory compensation.

More difficult is the case where the landlord has no intention of reconstructing the premises but has served a notice saying that he will oppose an application for a new lease on that ground. As he need not have the necessary intention until the time of the hearing (*b*) it would be difficult to found a claim for damages for fraudulent misrepresentation on such a notice alone. False answers to probing inquiries made on behalf of the tenant might, however, support an action. The statutory right to compensation for misrepresentation only applies where the court has refused an order.

The tenant might ask for a declaration that the notice was bad because it was not served in good faith. Lord Denning, in *Betty's Cafés, Ltd.* v. *Phillips Furnishing Stores, Ltd.* (*c*), thought that unless the notice was given honestly and truthfully it was voidable. He cited *Lazarus Estates, Ltd.* v. *Beasley* (*d*). The other Law Lords, however, gave no support to that proposition. If it is right, it means that the landlord at the time when he serves the notice must honestly and truthfully think that he will probably have the necessary intention at the time of the hearing, rather a vague state of mind to establish or disprove.

If the tenant did succeed in obtaining a declaration that the notice was void, the result would be that the old lease would continue at the old rent until the landlord served a fresh notice and meanwhile the tenant, if he had found other accommodation, might be able to assign the lease. Or he might assign the lease of the new premises. However, it might well suit him better if he could simply obtain his compensation rather than an extension of the lease. It is possible that he might rely on the doctrine of equitable estoppel and ask the court to issue a certificate under section 37 (4), even though the landlord no longer asserted an intention to reconstruct. The tenant would say that the landlord by his notice had manifested his intention to reconstruct; that that notice was intended to have legal effect and to be acted upon; that he had in fact acted on it by obtaining other accommodation. Now at law an estoppel cannot be based on a statement of future intentions (*e*). But since the *High Trees* case (*f*) such a statement

(*b*) *Betty's Cafés, Ltd.* v. *Phillips Furnishing Stores, Ltd.* [1958] 2 W.L.R. 513.
(*c*) *Ibid.*, at pp. 533–534.
(*d*) [1956] 1 Q.B. 702.
(*e*) *Jorden* v. *Money* (1854) 5 H.L.Cas. 185.
(*f*) [1947] K.B. 130.

may form the basis of an equitable estoppel. An equitable estoppel can only be used, it is said, as a shield not as a sword (*g*). It is difficult to say what use the tenant in the present circumstances would be making of the estoppel. In asking the court to dismiss his own application for a new lease and certify under section 37 (4) he would be turning the landlord's notice into a boomerang.

It will be seen that if the parties understand the intricacies of this skin game, neither side is without resources. But the law is in need of amendment to prevent the less alert from being ensnared. It is submitted that the Act ought to be amended in the following ways:

(a) The tenancy should not automatically be continued for more than, say, a month after the date of the hearing in the court of first instance. Further extensions should be at the discretion of the court like a stay of execution on a money judgment.

(b) If the landlord serves a notice saying that he will oppose an application for a new lease on the ground of an intention to reconstruct or any of the other grounds involving compensation, and on no other grounds, and the tenant on the strength of this quits the holding without making an application for a new lease, he should be entitled to the limited statutory compensation.

(c) If, thereafter, the landlord does not in fact carry out his expressed intention within a reasonable time, whether because he never in fact had the intention or because of a subsequent change of mind, the tenant should be entitled to full compensation for disturbance similar to that awarded on compulsory purchase.

(*g*) *Combe* v. *Combe* [1951] 2 K.B. 215.

RECREATIONAL CHARITIES

The New Act

By Spencer G. Maurice, Barrister-at-Law

The Baddeley case

In *Inland Revenue Commissioners* v. *Baddeley* (*a*) the House of Lords considered two deeds whereby land was conveyed to trustees on trust to permit its use "for the promotion of the" (in one case) "religious" and (in the other case) "moral social and physical well-being of persons resident" in a certain area "by the provision of facilities for religious services and instructions and for the social and physical training and recreation of such aforementioned persons who" were and were likely to become members of the Methodist Church and were of insufficient means otherwise to enjoy the advantages provided and "by promoting and encouraging all forms of such activities as are calculated to contribute to the health and well-being of such persons." Their Lordships (Lord Reid dissenting) held that the trusts so created were not valid charitable trusts and in so deciding called in question the status of a very large number of institutions, including in particular a great number of village halls, the trusts of which contained language similar to that which was considered in the *Baddeley* case and which had long been considered to be charitable. When consideration is given to the great number of rural parishes which exists, and to the fact that very many have village halls and very many others have at least the hope and commonly the immediate expectation of acquiring such premises, the significance of their Lordships' decision is easily appreciated. The situation which it created was sufficiently serious for the Government to find it desirable to promote a Bill which, in the words of the explanatory memorandum accompanying it, had as its object the giving of "statutory recognition to the charitable nature of certain trusts and institutions which exist for the purposes of providing recreational or similar facilities, or whose purposes include the provision of such facilities, in the interests of social welfare." That Bill became law as the Recreational Charities Act, 1958, on March 13, 1958. It is the purpose of this

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(*a*) [1955] A.C. 572; [1955] 2 W.L.R. 552.

article to examine the Act and to consider its ambit and certain related matters.

The declared purpose of the Act is the removal of doubt: its object is not to make new law. Inevitably, the *Baddeley* case turned to a large extent on its own facts. Their Lordships held that the particular trusts in question were not charitable but did not in terms say that no trust for recreational purposes was charitable. While the status of institutions with trusts akin to those in the *Baddeley* case has been in doubt, their trusts have never been pronounced non-charitable. The Act does not declare in terms that they always have been charitable, but the effect of section 1 is that such institutions as are there referred to are and are deemed always to have been charitable. Whether or not they were charitable in the state of the law as it existed before the passing of the Act is a question which is not answered, and it is made academic by the retrospective effect of section 1: if any particular institution were in fact charitable, then, well and good, and there is no room for the Act to operate, but if it were not, then the Act gives it retrospective charitable status and, moreover, validates it if and in so far as it might have been invalidly created if it lacked the status of a charity. While the Act cannot be said to have reversed the decision of the House of Lords—it may be supposed that care was taken that it should not have the effect of so doing—it may perhaps be thought that its practical effect has been to add a new head of charity to those listed by Lord Macnaghten in *Income Tax Special Purposes Commissioners* v. *Pemsel* (*b*), namely, charities for the provision of recreation.

Validation of recreational trusts

Subsection (1) of section 1 contains the essence of the statute, in that it is to this subsection that it is necessary to look to discover what trusts (other than miners' welfare trusts, which are dealt with in section 2) come within its scope. Subsection (1) provides that, subject to the provisions of the Act,

> ". . . it shall be and be deemed always to have been charitable to provide, or assist in the provision of, facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare: Provided that nothing in this section shall be taken to derogate from the principle that a trust or institution to be charitable must be for the public benefit."

(*b*) [1891] A.C. 531.

Social Welfare

Subsection (2) explains what is meant by the requirement that the facilities be provided in the interests of social welfare, enacting that this requirement,

> "... shall not be treated as satisfied unless—
>
> (a) the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended; and
>
> (b) either—
>
> (i) those persons have need of such facilities as aforesaid by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances; or
>
> (ii) the facilities are to be available to the members or female members of the public at large."

Subsection (3) gives examples of the type of trust covered by the section by providing that, subject to the requirement referred to, subsection (1)

> "... applies in particular to the provision of facilities at village halls, community centres and women's institutes, and to the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation, and extends to the provision of facilities for those purposes by the organising of any activity."

Public Benefit

Analysing the provisions of section 1, the first essential of a trust within its ambit is found to be the element of public benefit, which, save only in the anomalous poverty cases, is always an essential of legal charity. It is also commonly (though by no means always) an attribute of charity that it improves the conditions of life of the beneficiaries, and, in the case of trusts within the Act, this is made obligatory by subsection (2). But improvement of conditions of life is not enough: the particular manner in which they are improved must, to provide the necessary charitable element, fall within the spirit and intendment of the preamble to the Statute of Charitable Uses, 1601, either by relieving poverty, or by promoting education, or by promoting religion, or by reference to one or other of the other methods referred to in the Statute. It is true that where the community at large is benefited it suffices that the trust, though not falling within the first three categories—eleemosynary, educational and religious—is for some other purpose beneficial to the community, trusts for other purposes beneficial to

the community being the fourth head of charity according to Lord Macnaghten's classification in *Pemsel's* case, and need not, apparently, be for one of the specific purposes mentioned in the Statute of Charitable Uses, but that is an anomaly. Where only a section of the community is to benefit, then it is necessary to adhere strictly to the spirit and intendment of that statute: though in one respect the Recreational Charities Act steps outside the long-established limits. For a trust to be within that Act, either the persons benefited must have need of the facilities provided by reason of their youth—here the emphasis seems to be on education—or their age, infirmity or disablement—matters clearly within the intendment of the specific purposes referred to in the Statute of Charitable Uses—or their poverty or social and economic circumstances—clear references to eleemosynary purposes—or be available to the public at large, or—and this is where the Act seems to break new ground—to female members of the public at large. In other words, the requirements of charity are satisfied if the women of the community are benefited, even though the trust is not one referred to in, and not obviously within the spirit and intendment of, the Statute of Charitable Uses. This lets in women's institutes, specifically referred to in subsection (3), which, it is conceived, would otherwise fail to qualify as charities. Clearly, an organisation which exists for the benefit of men only does not qualify merely on the ground of being beneficial to them, without falling within any of the accepted forms of charity. Nor, for that matter, is any form of club, for men or women or both, where the *nexus* between the members is a private one. The concluding words of subsection (3) of section 1—" and extends to the provision of facilities for those purposes by the organising of any activity "—brings within the scope of the Act national organisations like the National Council of Social Service which, while not themselves directly providing recreational facilities, provide the organisation and administration whereby they may be provided.

Miners' welfare

Section 2 is concerned with the rather specialised case of trusts declared before December 17, 1957 (the day after that on which the bill was introduced in the House of Lords), which required or purported to require property to be held for the purpose of activities which are social welfare activities within the meaning of the Miners' Welfare Act, 1952. If at that date the whole or part of the property held on those trusts or of any property held with that property represented an application of moneys standing

to the credit of the miners' welfare fund or moneys provided by the Coal Industry Social Welfare Organisation, those trusts are to be treated as if they were and always had been charitable (subs. (1)). For the purposes of the section property held on the same trusts as other property is to be deemed to be held with it, though vested in different trustees (subs. (2)). It is thought that section 2 does not give rise to any difficulty and it will not be referred to further herein.

Past transactions

Section 3 contains savings and other provisions as to past transactions. Subsection (1) ensures that nothing in the Act shall have the effect of restricting the purposes which are to be regarded as charitable independently thereof. It was doubtless wise to include this provision, since otherwise it might possibly have been argued that the express mention of certain types of institution cast doubt on the status of others of a kindred nature which nevertheless do not fall within the ambit of the Act, yet have in the past been regarded as charitable. Here it may be noted that, although section 1 (3) contains a reference to facilities at village halls, it appears never to have been in doubt that a trust for a village hall *simpliciter* (that is to say, without any reference to, for example, recreation or social welfare) was charitable.

Subsection (2) (a) saves dispositions made before December 17, 1957, on the basis that there was no charitable trust by providing that nothing in the Act is to apply to make charitable any trust, or validate any disposition, of property if before that date that property or any property representing or forming part of it, or any income arising from any such property, has been paid or conveyed to, or applied for the benefit of, the persons entitled by reason of the invalidity of the trust or disposition. Nor is anything in the Act to affect any order or judgment made or given (whether before or after the passing of the Act) in legal proceedings begun before that day (subs. (2) (b)); nor to require anything properly done before that day, or anything done or to be done in pursuance of a contract entered into before that day, to be treated for any purpose as wrongful or ineffectual (subs. (2) (c)). The subsection is perhaps not very happily worded: thus it is not very clear what is the test whether or not something is "properly done." But reading it in the context of the Act as a whole it is obvious that the purport of the subsection is to protect those to whom property has been transferred because an instrument founding a trust of a kind within the ambit of the Act has been construed, judicially or otherwise, as not creating a valid charitable trust.

While subsection (2) is concerned with the case where an instrument has been treated as failing to create charitable trusts, subsection (3) is concerned with the statutory consequences of such failure, and must be read in conjunction with subsections (4) and (5), which contain exceptions to the general principle contained in subsection (3). That subsection enacts that,

> "Except as provided by subsections (4) and (5) . . . , nothing in this Act shall require anything to be treated for the purposes of any enactment as having been charitable at a time before the date of the passing of this Act, so as to invalidate anything done or any determination given before that date."

Two types of case spring to mind as coming within the ambit of subsection (3). First, the case where land was devised for charitable purposes and should have been sold under section 5 of the Mortmain and Charitable Uses Act, 1891, but was in fact retained on the basis that the trusts were not charitable; and, secondly, the case where death duties were paid on the death of a donor of a gift *inter vivos*, the advantage afforded to gifts for charitable purposes (by which the gift ceases to be liable to duty after one year from the death of the donor) not being received.

The writer understands that it has been suggested in some quarters that subsection (3) has some relevance to the attesting and enrolling and the recording provisions contained in sections 4 (6) and (9) and 5 of the Mortmain and Charitable Uses Act, 1888, and in section 29 (4) of the Settled Land Act, 1925, respectively. The earlier of those Statutes required attestation by two witnesses and enrolment in the Supreme Court either of the conveyance by which land was assured for charitable uses or, where the trusts were declared in a separate deed, of the conveyance or of that deed. The later statute substitutes for enrolment of such documents recording by the Charity Commissioners or the Ministry of Education (whichever has jurisdiction). A deed not enrolled or recorded in due time is void, subject to the power of the court or of the Commissioners or the Minister to extend the time for enrolling or recording, but the practice is not to grant an extension beyond twelve years, because after that time a possessory title will generally have arisen, in which case the persons in possession will hold the land, not on the terms of the void deed, but on the user trusts (which may, of course, be, and often are, the same as those of the deed). Since enrolment has been replaced by recording, the question of enrolment has not arisen since the Settled Land Act came into force on January 1, 1926, and where a deed which

should have been enrolled was not enrolled it is inevitably void so that all that now matters is the acquisition of a possessory title and the user trusts. But the extension of the time for recording is still very much a live issue, since the need for it is often overlooked, and the writer has seen many deeds executed within the last twelve years which have not been duly recorded.

The suggestion is, apparently, that a deed executed before the Recreational Charities Act came into force and not doubly attested and enrolled or recorded is validated by the Act. To begin with, this view must assume that any trust within the ambit of the Act was not charitable before the Act so that the question of enrolling or recording a deed relating to it could not arise. If this assumption were right, there might be some logic in saying that a deed which has always been regarded as valid because it did not relate to charity (so that the question of enrolling or recording did not arise) should be taken as valid and not be invalidated because it now transpires that the trusts were charitable. But it is not right: for, as has been pointed out above, the Act leaves unanswered the question of the status of any particular trust before the Act. Why, therefore, should a deed which contains trusts which have in fact always been treated as charitable, but suffers from the defect of failure to comply with the statutory requirements, so as long since to have been rendered wholly and irretrievably void, suddenly be resuscitated? The trusts long since established by user may be appreciably different from those contained in the deed. Are they suddenly to be displaced by the validation of the deed? The argument for validation becomes even more untenable when it is realised that subsection (3) has reference solely to a state of affairs prevailing before the Act. Clearly, there can be no question of the Act effecting the repeal of section 29 (4) of the Settled Land Act and therefore the enrolment provisions must be complied with in regard to transactions taking effect after the Recreational Charities Act came into force. It is submitted that there is no logic in a view of which a consequence is that the validity of a particular deed depends upon whether it is dated prior to or later than the coming into force of the Act without taking into account the existing legislation referred to above.

Income tax, etc.

Subsection (4) of section 3 provides that,

> "For the purposes of income tax, this Act shall not require anything to be treated as having been charitable at a time before the passing of this Act unless it would have been so treated in accordance with the practice applied by the Commissioners of

> Inland Revenue immediately before December 18, 1952 [the date on which Harman J. decided the *Baddeley* case at first instance (*c*)] but, subject to that and to paragraphs (a) and (b) of subsection (2) . . . , there shall be made all such adjustments, whether by way of repayment of tax, additional assessment or otherwise, as are made necessary in relation to income tax by the retrospective operation of sections 1 and 2 . . . , and nothing in the Income Tax Act, 1952, shall preclude the repayment by virtue of this Act of tax for the year 1946–47 or a subsequent year of assessment if a claim is made in that behalf to the Commissioners of Inland Revenue within two years from the date of the passing of this Act."

Where the charitable nature of an institution is established by the Act its right for the future to the income tax concessions allowed to charities is not in doubt, but whether or not it will succeed in recovering tax paid before the Act depends upon the view which the Commissioners took of it before December 18, 1952, not upon whether or not it falls within the ambit of sections 1 and 2. This seems a strange test, albeit an institution within those sections is in fact likely to have been treated by the Commissioners as charitable before the *Baddeley* case called its status into doubt. The reference to additional assessments seems to presuppose that in the case of certain institutions, not within the ambit of the Act, the Commissioners held their hand and refrained from making an assessment on them on the supposition that Parliament might accord them charitable status. Institutions unfortunate enough to fall into this category now stand to be assessed to arrears of tax. Where tax paid is recoverable by an institution the charitable status of which has been confirmed by the Act, it is recoverable for a maximum of twelve years, and the claim has to be submitted within two years of the passing of the Act, that is, before March 13, 1960. It is important, therefore, that claims should be made with as little delay as possible. Where property has been transferred away from charity on the assumption that there were no valid and subsisting charitable trusts, the question of recovering tax paid does not, of course, arise: this is made clear by the reference to paragraphs (a) and (b) of subsection (2).

The stamp duty concessions enjoyed by conveyances and leases of land for charitable purposes are the occasion for subsection (5) of section 3, which provides that,

> "As respects stamp duty on any instrument executed before the date of the passing of this Act, this Act shall not require

(*c*) [1953] 1 W.L.R. 84; [1953] 1 All E.R. 63.

anything to be treated as having been charitable for the purposes of subsection (1) of section 54 of the Finance Act, 1947 (which excepted certain instruments in favour of charities from certain increases of stamp duty under that Act), unless it would have been so treated in accordance with the practice applied by the Commissioners of Inland Revenue immediately before December 18, 1952; but subject to that and to paragraphs (a) and (b) of subsection (2) of this section, where more stamp duty has been paid on an instrument executed on or after the said December 18, and before the date of the passing of this Act than ought to have been paid having regard to sections 1 and 2 of this Act, the provisions of sections 10 and 11 of the Stamp Duties Management Act, 1891, shall apply as if a stamp of greater value than was necessary had been inadvertently used for the instrument, and relief may be given accordingly, and may be so given notwithstanding that, in accordance with the provisions of section 12 of the Stamp Act, 1891, the instrument had been stamped before the passing of this Act with a particular stamp denoting that it was duly stamped.

"An application for relief under the said section 10 as applied by this subsection may be made at any time within two years from the date of the passing of this Act, notwithstanding that it is made outside the time limited by that section."

This is quite straightforward, but certain points should be noted. First, the test for eligibility for relief is again the view taken by the Commissioners of Inland Revenue immediately before December 18, 1952. Secondly, there can be no relief where there has been such a disposition as is saved by subsection (2). Thirdly, relief is, in the nature of things, restricted to instruments stamped between December 18, 1952 (that date inclusive), and the date of the passing of the Act (that date exclusive): of necessity, instruments which received no concession before December 18, 1952, failed to qualify for relief because the Commissioners did not treat them as charitable and hence they are debarred from relief now. Fourthly, the fact that the instrument bears a denoting stamp does not debar it from relief. Fifthly, the usual time for recovering overpaid stamp duty is extended to two years: again, the claim must be made before March 13, 1960.

Miscellaneous

The remaining sections of the Act need but brief notice. Section 4 removes any limitation of the powers of the Northern Irish Parliament which would prevent their passing a corresponding

Act. Section 5 provides that the Act (and any similar Northern Irish Act, except in so far as the contrary intention appears) shall bind the Crown. Section 6 (1) sets out the short title of the Act. Finally, section 6 (2) takes cognisance of those cases where statutory references to charity in Acts applying outside England and Wales (notably the Income Tax Acts) are construed in accordance with the English law of charity by ensuring that in those cases the Act will operate to extend the references in their application to Scotland or Northern Ireland.

The Act in practice

Having considered the provisions of the Act, it is now desirable to turn to its application in practice, though as yet there has been little time for experience of its practical working and, while it is not free from difficulty, there has as yet been no case in which the court has been called upon to construe it. It seems likely, however, that a very large number of institutions—village halls and women's institutes in particular—whose status has been in doubt have had that status confirmed beyond doubt as charitable by the passing of the Act. Thus it seems clear that charitable status is confirmed in the case of those many village halls the trusts of which are those contained in the model trust deed for village halls issued by the National Council of Social Service and including a reference to the purposes of "social moral and intellectual development"; albeit that model trust deed has now been revised so as to declare purposes more obviously within the terms of section 1 of the Act.

The Charitable Trusts (Validation) Act, 1954

There are other cases, however, where the position is not so simple. Thus it is not uncommon to find trusts of a village hall which include the provision of "entertainment," and it seems by no means certain that a trust for entertainment is charitable, even in the light of the Recreational Charities Act. But such a trust will almost certainly be found intermingled with others which are undoubtedly charitable and it is submitted that in such a case the Charitable Trusts (Validation) Act, 1954, will come into operation conjunctively with the Recreational Charities Act and, by its effect of striking out the offending purpose or purposes, leave trusts which are charitable under the Recreational Charities Act, whether or not they were charitable otherwise. But in this connection it is necessary to bear in mind the limits on the operation of the Act of 1954, to which attention has been directed by *Vernon* v. *Commissioners*

of Inland Revenue (*d*) and *Re Gillingham Bus Disaster Fund, Bowman and Others* v. *Official Solicitor and Others* (*e*).

In the first place, for the Act to have any application, there must be an imperfect trust provision so describing the objects for which the trust property is to be held or applied that, consistently with its terms, the property could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable. In *Vernon* v. *Commissioners of Inland Revenue* Upjohn J. was concerned with a scheme whereunder there was a primary trust of a recreation ground and club house for a purpose which was not charitable, because it was for the use and enjoyment of the employees of a certain company, although the trustees might in their discretion permit other persons to use and enjoy the land, and there was also in the scheme provision for the application of the income of a fund for purposes some at least of which were clearly charitable. The learned judge held that the land could not be used "exclusively for charitable purposes" and consequently the scheme was not an "imperfect trust provision" and so not validated by the Act. Secondly, for the Act to come into operation there must be a disposition or covenant "invalid under the law of England and Wales" within the meaning of section 2 (1) of the Act. The scheme in *Vernon* v. *Commissioners of Inland Revenue* was capable of amendment by the court and therefore not invalid.

Thirdly, an imperfect trust provision is not validated unless there is a disposition "creating more than one interest in the same property" within section 2 (3) of the Act. In *Re Gillingham Bus Disaster Fund* the "dispositions" were contributions to a fund "to be devoted, amongst other things, to defraying the funeral expenses, caring for the boys who may be disabled, and then to such worthy cause or causes in memory of the boys who lost their lives as the mayors [of Gillingham, Rochester and Chatham, the promoters of the fund] may determine." It was admitted that the primary objects of the fund were not charitable, but it was contended that "such worthy . . . causes . . . as the mayors may determine" constituted an imperfect trust provision within section 1 (1) which was validated by section 1 (2) in relation to gifts to the appeal fund. The Court of Appeal (Lord Evershed M.R. and Romer L.J., Ormerod L.J. dissenting), affirming the decision of Harman J., held that the Act did not apply: although a contribution to the fund was a disposition, this disposition did not create any interest, or any separate interest, in favour of each of the worthy causes; the

(*d*) [1956] 1 W.L.R. 1169; [1956] 3 All E.R. 14.
(*e*) [1958] Ch. 300; [1958] 1 All E.R. 37; [1958] 3 W.L.R. 325 (C.A.); [1958] 2 All E.R. 749 (C.A.).

act of disposition by the individual donor did not create an interest in his gift in favour of the worthy causes, such an interest being "created" only by the joint effect of the disposition and the letter of appeal for contributions which had been sent out or the exercise of discretion by the mayors.

A further point to be remembered when considering whether a trust which is not saved by the Recreational Charities Act alone may yet be saved by the combined effect of that Act and the Charitable Trusts (Validation) Act is the date of the instrument. Thus, a trust provision created on or after December 16, 1952, is outside the ambit of the Charitable Trusts (Validation) Act (*f*).

Void trusts

It remains to consider the position where a trust deed which might otherwise have been within the ambit of the Recreational Charities Act is void; for example, because it was not recorded under the Settled Land Act and it is now too late to have it recorded. In such a case the trusts upon which the property is held are the user trusts, though these may, of course, very well be the very trusts declared in the void instrument. It is submitted that it is then clearly open to the trustees to declare the user trusts by deed if they wish to do so, and that that deed could then be recorded. In practice, however, it may be desirable to obtain a scheme (from the Charity Commissioners or the Minister of Education, as the case may be) for the removal of doubt, and particularly is this the case where it is desired to change the trusteeship (for example, by setting up a representative body) in a manner not open to the existing trustees under the Trustee Act, 1925, or otherwise. A scheme will, of course, be necessary if it is contended that the user trusts have become impracticable so that a case has arisen for applying the trust property *cy-près*.

While the Recreational Charities Act has effected its purpose to the extent of saving for charity very many of those institutions the status of which was in jeopardy as a result of the *Baddeley* case, it is clearly not a panacea for all the defects of all trusts for purposes akin to those referred to in section 1 (3). While it may be impossible to find a remedy in many such cases, at least the Act provides a guide as to what should be done when a new recreational charity is being founded: and many are founded each year. It should not be difficult for the founders to ensure that the trusts are framed so that they are beyond doubt charitable.

(*f*) The limits within which the Charitable Trusts (Validation) Act, 1954, operates were considered by the present writer in an article, "Validation of Charitable Trusts," in *The Conveyancer*, Vol. 18, p. 532.

THE CREATION OF SUB-TRUSTS UNDER A POWER OF ADVANCEMENT

By D. W. M. Waters, Barrister-at-Law

The recent judgment of Upjohn J. in *Re Wills' Will Trusts* (*a*) is of some considerable significance to practitioners since it marks the first suggested limitation upon the methods available for the exercise of a power of advancement. In a previous article (*b*) the present writer reviewed the question of the scope of this power, but the issues raised by the recent case deserve more than the footnote reference that was able to be given on that occasion.

The relevant facts of the case were these. A testator gave the residue of his estate on trust as to three-fifths to such of his children who, being male, should attain the age of 25, or, being female, should attain that age or marry under it. The remaining two-fifths he gave to his wife for life, remainder to his children on the same trusts. The trustees were also given the power with the usual consents as to the remaining two-fifths to " raise any part [up to] one moiety of the then expectant contingent presumptive or vested share . . . of any person under any of the trusts and to pay or apply the same for his or her advancement or benefit or for the benefit of any child children or wife of such person " as the trustees should think fit. The testator died in 1927 leaving five infant children including his eldest son, X, who married in 1939. While X was on active service in the Middle East, and four months before his attaining 25, twin sons were born to him in 1940. Two weeks later the trustees by deed and in exercise of the power of advancement appropriated investments to X's contingent share, and declared that the investments were now held on trust for the twin sons on their attaining 21. Should either son die under 21 the survivor was to take both shares, and, if they both failed to attain that age, the trust fund would revert upon the trusts of the testator's will. In 1941 a third son was born to X, and X himself died on active service two years later.

A summons was subsequently taken out to establish whether the power was void on the grounds of perpetuity, or whether, if valid, the exercise of the power was invalid since, it was argued, the power did not enable the trustees to create sub-trusts, and

(*a*) [1958] 3 W.L.R. 101.
(*b*) (1958) 22 *The Conveyancer* (N.S.) 413.

moreover the trustees had raised, paid or applied nothing in merely declaring such new trusts. Upjohn J. having decided that the power did not fail for perpetuity, the question of the exercise of the power became vital.

THE VALIDITY OF SUB-TRUSTS

Curiously enough sub-trusts created under a power of advancement have only received consideration in first instance decisions (*c*), and, as Upjohn J. noted, in each of those cases the court sanctioned the creation of a sub-trust without appearing to have heard argument on the point or to have considered whether there was a "raising" or whether the power might be exercised in such a manner. Nevertheless, his Lordship was of the opinion that, as far as the first instance court was concerned, those cases did establish "the proposition that trustees exercising a power of advancement may make settlements upon objects of the power if the particular circumstances of the case warrant that course as being for the benefit of the object of the power" (*d*).

(a) The Wording of the Power

In each of the four reported cases the language of the power differed to some degree. In *Roper-Curzon* v. *Roper-Curzon* the trustees were enabled to "advance . . . and apply," in *Re Halsted* to "advance," in *Re Ropner* (under express power in the settlements) to "advance . . . and to apply," and, by implication (under section 32 of the Trustee Act, 1925), "to pay or apply," and in *Re Meux* (under section 53 of the same Act) the court made an order "with a view to the application of the capital or income." However, in *Roper-Curzon* v. *Roper-Curzon* and *Re Halsted* Lord Romilly M.R. and Farwell J. respectively do not appear to have heard argument upon whether the language permitted the proposed method of the advance, and both justified the sub-trust in question on the basis of the additional advantage to the object of the power.

In 1951 *Re Vestey's Settlement* (*e*) was decided, and it was in the light of the Court of Appeal's interpretation in that case

(*c*) *Roper-Curzon* v. *Roper-Curzon* (1871) L.R. 11 Eq. 452; *Re Halsted's Will Trusts* [1937] 2 All E.R. 570; *Re Ropner's Settlement Trusts* [1956] 1 W.L.R. 902; *Re Meux* [1958] Ch. 154. *Re Tetley*, an unreported decision of Wynn-Parry J. on March 31, 1952, was mentioned in *Re Ropner*.

(*d*) [1958] 3 W.L.R. 101, at p. 108. In *Re Wills' Will Trusts* it was clearly beneficial to the infant sons that, with their father on active service, a settlement should be made. The terms of the settlement, *i.e.*, the contingent vesting, were also beneficial in that an out and out payment to an infant followed by his subsequent death in infancy, probably intestate, would have resulted in heavy estate duty. Incidentally such duty would have lessened the sum taken on an intestacy by other possible objects of the power, *i.e.*, the father and mother or survivor.

(*e*) [1951] Ch. 209.

of a settlement provision "to pay or apply" that Harman J. approached the word "apply" (common to both the settlements and section 32) in *Re Ropner*. Unaided, as it seems, by argument (*f*), Harman J. said that, having regard to *Re Vestey*, "where it was held to be an application of money merely to set it aside to accumulate for a child's eventual benefit, it must be an application of money to transfer it to trustees of a settlement to be made for the child's benefit" (*g*). The following year, in *Re Meux*, it was held by Wynn-Parry J. that the transfer to trustees of a sub-trust of the proceeds of sale of a vested entailed interest would amount to an application "within the meaning of that word as used in section 53" (*h*), and it is worthy of note that, though, having observed Harman J.'s decision in *Re Ropner*, Wynn-Parry J. said that it would be wrong to give "apply" in section 32 the same meaning as "application" in section 53, he did not say that he disagreed with *Re Ropner* (*j*). It was also Upjohn J.'s opinion in *Re Wills* (*k*) that Wynn-Parry J. would have come to a similar conclusion on the language of section 32. But, if the words "apply" and "application" are now fairly well settled at first instance, it is true that on the only occasion that they have been considered in a higher court, namely, *Re Vestey*, Evershed M.R. expressly left open the question whether "pay or apply" in a settlement permitted the creation of sub-trusts. It seems proper to say, however, that his Lordship took this course not because he had expressed any doubts on the subject, but rather because he found the instant facts did not include a sub-trust and was prepared to leave that matter for the mental exercise of other judges when the question directly presented itself (*l*).

The language in *Re Wills* was "to raise . . . and to pay or apply." This meant that whatever meaning had been attached by

(*f*) Harman J. thought that counsel's concession was "rightly made" that he (counsel) could not find argument against the proposed sub-trust: [1956] 1 W.L.R. 902, at p. 905.

(*g*) *Ibid.*, at pp. 905, 906. See for further comment (1958) 22 *The Conveyancer* (N.S.) 413, at p. 427.

(*h*) [1958] Ch. 154, at p. 166.

(*j*) *Ibid.*

(*k*) [1958] 3 W.L.R. 101, at p. 107.

(*l*) [1951] Ch. 209, at p. 221. There is no authority upon whether trustees may create sub-trusts under the word "pay." In *Re Vestey* the Court of Appeal applied the word to out and out allocations to individual infant objects of the power, and it is possible that the word could have application to the processes of setting up sub-trusts. In *Re Vestey* Jenkins L.J. stressed that "payment" must be interpreted in the context, and he quoted with approval *Re Banbury* [1951] Ch. 1, where the trustees were required to set aside an annual sum free of tax. Danckwerts J. held this to be a "payment" within section 25 of the Finance Act, 1941, "though in truth," said Jenkins L.J. (at p. 222), "the transaction was not in the strict sense of the word 'a payment,' but merely the transfer of an amount from one account to another in the hands of the same trustees."

the courts to the latter two verbs Upjohn J. had also to discover a "raising" in the single act of declaring investments to be allocated to a share and thereafter held upon sub-trusts. Since "raise" was not reported as appearing in the previously considered language of the earlier cases and was certainly not discussed, Upjohn J. had no support for his own conclusion whether he interpreted the word in a narrow or broad sense (*m*). Narrowly "raise" might be said to mean "realise" or possibly "make available"; Upjohn J. took the broader meaning. The investments were "raised" not "by being realised but by being taken out of the trusts of residue and held on new trusts for the benefit of the twins," and this was so even if subsequently the sub-trust failed and the raised investments fell back into residue (*n*). It would seem, however, that Upjohn J. could have reached the same conclusion had he taken the meaning "make available" (which he did not mention or discuss); this interpretation would have allowed the holding on the sub-trusts to be authorised by the succeeding word "apply," for which latter proposition there was precedent. Nevertheless, in an instrument which empowers the trustees, for example, "to raise investments for the advancement maintenance or benefit" of objects, *Re Wills* is authority for the creation of sub-trusts.

(b) The Notion of Benefit

It will be observed from Upjohn J.'s words in interpreting "raise" that in reaching his conclusion he attached some importance to the benefit resulting to the objects from the transaction. Indeed, it is this feature which seems to have dominated the attention of each judge who has had to consider the validity of sub-trusts. In *Roper-Curzon's* case, where the power spoke not of benefit but solely of "advancement or preferment," Lord Romilly M.R. was only prepared to sanction the exercise of the power on the terms that it took the form of a settlement. The beneficiary's age and liabilities clearly suggested the wisdom of this course. In expressly considering "whether [the trustees] have any such power at all" (*o*), Farwell J. gave his approval in *Re Halsted* on the grounds of benefit. Again, counsel for one group of defendants conceded in *Re Ropner* that the creation of sub-trusts was a proper exercise of the power provided real benefit ensued for the objects,

(*m*) It is not clear from the reports whether "raise" was a term employed in the power of advancement in *Re Halsted's Will Trusts*, but from Farwell J.'s opening words in the judgment it seems highly likely. In any event Farwell J. would clearly have agreed with Upjohn J.'s later interpretation.

(*n*) [1958] 3 W.L.R. 101, at p. 109.

(*o*) [1937] 2 All E.R. 570, at p. 571.

and *Re Meux* was distinguished from *Re Heyworth's Contingent Reversionary Interest* (*p*) on the grounds that in the former case the sale was to be followed by a beneficial settlement of the proceeds, and that such an arrangement was so necessarily interrelated as to be a "single transaction."

It is clear then, not only from these cases but from the overall attitude of the Court of Appeal in *Re Vestey*, that in considering the validity of sub-trusts the court places the emphasis upon the degree of benefit to the immediate object rather than upon the niceties of language. Perhaps it is not without coincidence that in four out of the five reported cases to date, and in *Re Vestey*, the power permitted an advance for "benefit" which, as was suggested previously, is satisfied not only in the purpose but to some extent in the method of advance. In the case of these powers in particular it therefore seems highly unlikely that any appeal court will challenge the validity of such trusts today (*q*).

The Terms of a Sub-Trust

Previous cases have been concerned with establishing that trustees may create such trusts provided their terms are really beneficial. Nothing has been said in open court of how elaborate such trusts may be. It is possible that in the decided cases the resultant settlements were all "of the simplest kind" (*r*). In *Re Meux*, to which Upjohn J. was there referring, the proceeds of sale of the defendant's vested estate tail were simply settled on him for an estate tail contingent on attaining 21. The settlement in *Re Wills* was of a similar character (*s*), and, as Upjohn J.

(*p*) [1956] Ch. 364.

(*q*) It appears to have been argued in *Re Wills* [1958] 3 W.L.R., at p. 108, that "it followed from *Re Ropner* that trustees could take away property from a beneficiary and that could not be right." Upjohn J. made no comment upon this argument and it is somewhat difficult to appreciate its force. Consents were required from the life tenant in *Re Ropner*, and the reference here is to the objects of the power. But is it convincing to argue that trustees "take away" when they merely delay the vesting in possession of capital? Nor is it an attack on sub-trusts to criticise the power of trustees to advance to contingent interests, if this is the argument. Condemnation of this sort is more concerned with the terms than the principle of sub-trusts.

It was also argued in *Re Wills*, see p. 107, that *Roper-Curzon's* case and *Re Halsted* could be explained on the footing that the settlements were made at the request of the object of the power. This would mean that the court was consenting to out and out payments, and the beneficiary in each case sought the settlement of those sums. The reports rather suggest that the object in each case was prepared to agree to a sub-trust in the hope that this would induce the court to consent to an advance, *i.e.*, purpose plus method together justifying advance. Admittedly *Roper-Curzon's* case did not involve a power to "benefit," but the attitude of Lord Romilly M.R. was identical. Futher, the inability of the object to give consent to the advance was expressly overcome in *Re Ropner* by the fact that there could be a beneficial settlement.

(*r*) *Re Wills' Will Trusts* [1958] 3 W.L.R. 101, at p. 107.

(*s*) *Ante*, at p. 1.

remarked in the latter case, "income would still be available for . . . maintenance pending vesting" (*t*). But greater complexity appears in *Re Halsted*. The trustees were there permitted to settle the advanced sum on the sole beneficiary of the power for life, remainder to his widow, remainder to the beneficiary's children, provided the ultimate trust took the form of a reversion to the residuary estate, that is, the original trust.

In *Re Wills*, however, argument was advanced that such trusts could not be valid in view of the decisions in *Re May's Settlement* (*u*) and *Re Mewburn's Settlement* (*a*). Upjohn J. was able to dismiss this argument on the grounds that those cases were "really considering a different problem, namely, whether in exercising a power of appointment the appointor might properly include a power of advancement, or whether such inclusion infringed the principle *delegatus non potest delegare*" (*b*), but this dismissal led his Lordship to make an interesting *obiter* statement on the principle established by the cases on this point (*c*):

> ". . . unless upon its proper construction the power of advancement permits delegation of powers and discretions, a settlement created in exercise of the power of advancement cannot in general delegate any powers or discretions, at any rate in relation to beneficial interests, to any trustees or other persons, and in so far as the settlement purports to do so it is *pro tanto* invalid. I say that without prejudice to the propriety of including an ordinary power of advancement in such settlement: see *Re Morris* (*d*)."

The similarity of the special power of appointment and the power of advancement is at once evident. In each case the donee of the power is enabled to dispose of certain property among a limited number of persons, and in neither case as a rule may the donee exercise the power in favour of himself (*e*). That is to say that, when under a power of advancement the trustees may also advance to contingently interested persons, the donee's role under both powers is to choose among the objects who, if any, are to receive the fund, and how much each is to receive. A line of cases since 1915, however, has established that this role of selection

(*t*) [1958] 3 W.L.R. 101, at p. 108.
(*u*) [1926] Ch. 136.
(*a*) [1934] Ch. 112.
(*b*) [1958] 3 W.L.R. 101, at pp. 106, 107.
(*c*) *Ibid.*, at p. 108.
(*d*) [1951] 2 All E.R. 528.
(*e*) On its proper construction the designated class of possible beneficiaries may include the donee of the special power of appointment. Moreover, the special power may specify that, if the power is exercised, specific proportions be allocated to recipients.

under a special power of appointment is personal to the donee, and that he may not as a result delegate it (*f*). In one matter only has this rule been waived; in exercising the power the donee is permitted "in deference to normal conveyancing practice" (*g*) to confer the ordinary power of advancement upon trustees. It is this line of authority which has now been applied to the exercise by trustees of the power of advancement.

In applying this authority Upjohn J. drew the familiar line between administrative discretions and what have been termed dispositive discretions (*h*). This would mean that in creating sub-trusts trustees may delegate their administrative powers and discretions, but they alone must determine among the objects of the power the questions of who and how much. The distinction between these two types of discretions was discussed in this journal a few years ago (*i*), and, as the author said on that occasion, "a dispositive discretion would include any power which alters the balance among the beneficiaries and includes such powers as powers of appointment, powers of maintenance and advancement, and discretionary and protective trusts" (*k*). The ability of the trustees to delegate their dispositive discretions will then depend, as Upjohn J. said, upon the language in which the power of advancement is expressed, and upon this subject the special power of appointment cases offer limited guidance.

(a) Delegation by Conferment of a Power of Advancement

The distinction between administrative and dispositive discretions is not, of course, relevant to the donee's authority to delegate under a power of appointment. All delegation is necessarily of dispositive discretions. It has therefore been crucial to discover whether a trust set up in exercise of a special power may include

(*f*) Under a general power of appointment where the donee may appoint to himself, there is no restriction upon delegation. See, *e.g.*, *Heather* v. *O'Neill* (1858) 2 De G. and J. 294: husband and wife under an unlimited joint power validly appointed to such uses as the husband should appoint. For a hybrid power see *Re Triffit's Settlement* [1958] Ch. 852. In that case the language of the power contained words similar to those in *Re Morris's Settlement Trusts* (see footnote (*g*), *post*), *i.e.*, "in such manner," but the power was otherwise so "widely drawn" (at p. 934) that it was only different from a general power in that it was exclusive of two persons as possible objects of the power.

(*g*) *Re Morris's Settlement Trusts* [1951] 2 All E.R. 528, at p. 532, *per* Jenkins L.J.

(*h*) Cheshire, *Modern Real Property*, 8th ed. (1957), p. 203. It is not thought that Upjohn J.'s apparent hesitation, *i.e.*, "at any rate," carries importance. To bar trustees from delegating *any* power or discretion would prevent trustees *inter alia* from ensuring that the range of investments at any one time is in the best interests of the beneficiaries. His Lordship could not have meant this.

(*i*) Kiralfy, "Discretionary Powers of Trustees," (1953) 17 *The Conveyancer* (N.S.) 285.

(*k*) *Ibid.*, at p. 289.

in any event a power of advancement, or whether the language of the particular special power must permit the inclusion, that is, the delegation. The answer presented by the cases is certainly not clear. In *Re Greenslade* (*l*) the language of the special power was "in such shares and in such manner" as A should appoint, and in exercise of the power A created a trust conferring upon the trustees a power to advance (among others) to contingently interested persons for "maintenance, education or benefit." Eve J. held that the power of advancement was invalidly conferred on the grounds that the special power did not permit A's delegation; the trustees could deprive ultimate vested interests by choosing meanwhile to advance to contingent interests. The attitude of the Court of Appeal in *Re Joicey* (*m*), decided the following year, was very similar. In this case A was empowered to appoint among particular beneficiaries "for such interests and in such proportions and in such manner in all respects" as she chose. Again a trust was set up, and again a largely similar power of advancement was conferred. However, all three judges distinguished between an "ordinary" (*n*) power of advancement and the power with which they were confronted. The latter permitted the trustees to advance to contingent interests and thus "alter the devolution of the estate" (*o*); it was only the former power "as to which there might possibly be some argument" (*p*). But even the wide language of the power in this case did not permit the proposed delegation.

In 1926, in *Re May's Settlement* (*q*), Astbury J. was able to agree to the validity of such an "ordinary" power. Since all the possible interests were vested in interest, the power of advancement was no more than a power of acceleration, and Astbury J. remarked that had the interests been contingent the principle of *Re Greenslade* would have applied. In fact there was here delegation solely as to the time of payment, and looked at in this way this "ordinary" power of advancement hardly seems a dispositive power at all—it cannot alter the balance among the beneficiaries; it is neither concerned with the question of who nor of how much.

It was not until 1934 that these earlier cases began to be of dubious authority. Conveyancers were regularly drafting powers of advancement which permitted advances to be made to contingent interests, and were therefore conferring fully dispositive discretions

(*l*) [1915] 1 Ch. 155.
(*m*) [1915] 2 Ch. 115, upholding Joyce J. at first instance.
(*n*) *e.g.*, *ibid.*, at p. 120, *per* Cozens-Hardy M.R.
(*o*) *Ibid.*
(*p*) *Ibid.*
(*q*) [1926] Ch. 136.

upon trustees. The typical pre-1925 power of advancement was even adopted by the legislature in section 32 (1) of the Trustee Act, 1925. But as a result of *Re Mewburn's Settlement* (*r*), where Maugham J. was confronted with a pre-1925 trust created under a special power and containing a power of advancement practically in the words of the later statutory section, the issue becomes confused. Did the learned judge approve of this power of advancement in deference to the now statutorily recognised conveyancing practice, or did the language of the special power—" with such gifts over and generally in such manner for the benefit " of appointees as A should appoint—permit a delegation, namely, this advancement power? The judgment attaches importance both to the 1925 Act and the language of the special power, which approach leaves open the question whether the power of section 32 (1) is now regarded as a delegation. If authority for delegation is still necessary, then, because of the now recognised conveyancing practice, will the courts be prepared to accept less broad language in the special power in order to authorise the delegation? And if this question is to be answered in the affirmative (as it may well be), then do *Re Greenslade*, *Re Joicey* and *Re May's Settlement* continue to be useful authority?

It is suggested, with respect, that *obiter* statements by Evershed M.R. and Jenkins L.J. in *Re Morris's Settlement Trusts* (*s*) have not effectively clarified the position. Jenkins L.J. restated the principle of no delegation without authorisation, quoting *Re Greenslade* and *Re Joicey*, and then went on to say: " Its application, however, clearly depends on the terms of the particular power, and it has been held not to be infringed by the inclusion in an appointment of an ordinary power of advancement,"—that is, it is *not* a delegation for the purposes of the principle—" at all events where the instrument creating the power enables any appointment to be made 'in such manner and form in every respect,' or 'generally in such manner for the benefit of' the objects of the power, as the donee of the power may appoint: see *Re May's Settlement* and *Re Mewburn's Settlement* " (*t*). But if it is not such a delegation, why is the language of the special power relevant? His Lordship went on to comment upon the statutory recognition of conveyancing practice in the form of section 32 (1) with its power to advance to contingent interests, remarking in so doing that he thought it might " fairly be said that an exception

(*r*) [1934] Ch. 112.

(*s*) [1951] 2 All E.R. 528. And in *Re May's Settlement* " ordinary " referred to a power under which interests vested in interest might be accelerated to take earlier effect in possession.

(*t*) *Ibid.*, at p. 532.

from the general rule has been recognised with respect to ordinary powers of advancement" (*u*).

This remark, contrary to the earlier quoted passage, suggests two things. First, that an ordinary power of advancement now means a power to advance to contingent interests though this may affect the actual devolution of the estate, and, secondly, that such a power is not a delegation (whatever the language of the special power) for the purposes of the principle *delegatus non potest delegare*. Unhappily the Master of the Rolls merely reflected that *Re Mewburn's Settlement* was "essentially different" (*a*) from the case in hand, but he did say that the power of advancement in *Re Mewburn* had become a common conveyancing form, so that it might be said that he was in agreement with Jenkins L.J.'s subsequent remark (*b*).

How does this conclusion affect sub-trusts set up in exercise of a power of advancement? In *Re Wills* Upjohn J. obviously took the "exception" interpretation of *Re Morris* when he said that without express delegation it was still permissible to include in such a trust "an ordinary power of advancement" (*c*). It is therefore suggested, with respect, that the current of judicial opinion having been more in this direction since 1934, whatever the reliability of the cases, trustees would now be perfectly justified in relying upon Upjohn J.'s *obiter* remark. On the other hand, for the time being trustees would be well advised to restrict any sub-trust advancement power to the type of power contained in section 32 of the Trustee Act, 1925.

(b) Delegation by the Creation of Protective and Discretionary Trusts

Trusts of this nature set up in exercise of a special power of appointment have been considered by the courts on only two occasions. On both occasions the creation by trust of a forfeitable life interest was considered to be a perfectly valid exercise, and the discretionary trust was unequivocally held to be invalid.

(*u*) *Ibid.*

(*a*) *Ibid.*, at p. 531.

(*b*) Though *Re Greenslade* and *Re Joicey* must now in the light of Jenkins L.J.'s "exception" view be considered wrong, or at least of doubtful authority on their decisions, it is arguable that they are still authority as to the principle they involve. This would explain Jenkins L.J.'s sentence (at p. 533) in *Re Morris* that "similar words [*i.e.*, 'in such manner in all respects'] appear to have been present in the provisions conferring the powers in *Re Joicey* and *Re Greenslade*, but were not regarded as sufficient to authorise the attempted delegation." *I.e.*, the words of the power of appointment did not authorise *any* delegation, authority being considered necessary in those cases for the power to advance to contingent interests.

(*c*) [1958] 3 W.L.R. 101, at p. 108.

The protective trust was directly under review in *Re Boulton's Settlement Trust* (*d*). A power of appointment enabled the donee to appoint among certain persons to a remainder interest (*e*), and in exercise of the power the donee set up the trust machinery of section 33 of the Trustee Act, 1925. Eve J. rejected the discretionary trust, but said of the trust under section 33 (1) (i) that "a power to appoint a life interest must, I think, include a power to appoint an interest which may determine on the happening of some earlier event than death" (*f*). And in *Re Morris*, where the appointee was given a life interest determinable on attempted alienation or charging, counsel opposing the particular exercise of the power conceded the validity of this forfeitable life interest, a concession which appears to have been accepted by the court without question (*g*). The reason behind these cases is obvious; the donee was personally deciding the issues of who and how much.

On the other hand Eve J. had no hesitation in rejecting the discretionary trusts of section 33 (1) (ii); "it operates as a delegation to the trustees of the donee's discretion as to selection and distribution" (*h*). The Court of Appeal was equally emphatic in *Re Morris*, and Jenkins L.J. made it clear, as Eve J. before him, that the discretionary trust was invalid even if the objects were all possible objects of the power of appointment (*i*).

The emphasis with which these discretionary trusts have been rejected puts it almost beyond question that discretionary trusts may not be created under a power of advancement which upon construction does not permit the delegation of dispositive discretions (*k*). So, unless the language of the power is clearly enabling, trustees should avoid exercising their power in this manner. On the other hand, trusts setting up forfeitable beneficial interests are in a different position. The principle of *delegatus non potest delegare* would not prevent trustees from employing this type of

(*d*) [1928] 1 Ch. 703.

(*e*) The language of the power is not given in the report, but in *Re Morris* Evershed M.R. ([1951] 2 All E.R., at p. 531) said that it appeared to be identical with the language of *Re Morris*, *i.e.*, "in such shares and in such manner in all respects."

(*f*) [1928] 1 Ch. 703, at p. 708.

(*g*) See [1951] 2 All E.R. 528, at p. 532, *per* Jenkins L.J. Evershed M.R. (at p. 531) said that he was "certainly not prepared to disapprove of Eve J.'s decision."

(*h*) [1928] 1 Ch. 703, at p. 708.

(*i*) [1951] 2 All E.R. 528, at p. 533. In both *Re Boulton* and *Re Morris* the discretionary trust included persons who were not possible objects of the power of appointment.

(*k*) The argument is feasible that the trustees' role under a power of advancement is in this sense distinct from the role of the donee of a power of appointment, that the trustees must consider in all respects the greater advantage of the potential recipient while the donee of the appointment power is merely concerned with the conferring of idle enrichment.

trust; they must merely ensure that they do not bring section 33 into operation on failure of any forfeitable interest (*l*).

The charge trustees might have to meet would be of a different character, namely, as arose from *Re Ropner* (*m*), that they have taken away property from the beneficiary. For example, if the beneficiary is entitled to an absolute interest contingent upon his attaining a certain age and the trustees have a power of advancement in favour of the beneficiary, his wife, and his children (the situation in *Re Wills*), then the trustees should not exercise their power by conferring upon the beneficiary a life interest with successive remainders to his widow and children equally, unless a bona fide benefit can be shown to exist therein (*n*). But, moreover, if the particular circumstances make it beneficial so to do (*o*), the trustees might give the immediate beneficiary a life interest determinable on attempted alienation, charging, or bankruptcy with similar successive remainders to his widow and children.

Examples of Exercise of the Ordinary Power of Advancement

1. On trust for A (*p*) on attaining the age of 21, and on failure reversion to the original trust fund; a power of advancement in the trustees.
2. On trust for A and B on each attaining the age of 21 with right of survivorship on A or B dying under 21, and on total

(*l*) And to the extent to which they do bring it into operation the sub-trust is only *pro tanto* invalid.

(*m*) See *ante*, p. 31, footnote (*q*).

(*n*) "Trustees cannot under the guise of making an advancement create new trusts merely because they think they can devise better trusts than those which the settlor has chosen to declare": [1958] 3 W.L.R. 101, at p. 109, *per* Upjohn J.

(*o*) *e.g.*, the power of advancement (or maintenance) includes "benefit," the purpose of the payment is to avoid estate duty, and the beneficiary is "a man of improvident and unsteady character," as in *Re Brittlebank* (1881) 30 W.R. 99, perhaps additionally with children who are also possible objects of the power.

(*p*) There are no reported cases on the application of the perpetuity rule to the exercise of a power of advancement in the form of a sub-trust. Yet the similarity of the special power of appointment and the power of advancement suggests that the same rules will apply. This view is also advanced in Morris and Leach, *The Rule against Perpetuities* (1956), p. 142. In this event the power of advancement will take effect for the purpose of lives in being from the date of the creation of the power. It is therefore desirable to note the following reservations:

[a] In Examples 1 and 2 A, or A and B, objects of the power, need not be lives in being, but they *must* each attain the age of 21, if at all, within lives in being and 21 years.

(In *Re Will's Will Trusts* the life in being was the father of the infants, and the terms of the sub-trust were therefore not void for remoteness.)

[b] In Examples 3 and 4 A *must* be a life in being.

Though the terms of the sub-trust be not void on grounds of remoteness, yet in Examples 3 and 4, if A is the only life in being, the sub-trustees' power of advancement (s. 32 of the Trustee Act, 1925) must be limited to a period closing 21 years after A's death. If the wife is also a life in being, this limitation will not be necessary.

The sub-trustees may exercise their power by the setting up of a further sub-trust on the pattern of Examples 1 and 2 (see reservation above as to exercise of

failure reversion to the original trust fund; a power of advancement in the trustees (*q*).

If the trustees have a power to advance for "benefit" (and perhaps in any event in view of *Roper-Curzon* v. *Roper-Curzon*, though this is not sufficiently reliable):

3. On trust for A for life, remainder to A's widow for life or widowhood, remainder to the children of A (all objects of the power) (*r*); a power of advancement in the trustees (*s*).
4. On trust for A for life determinable on bankruptcy or attempted alienation, remainder to his wife or widow for life or widowhood, remainder to his children who, being male, attain the age of 21, or, being female, attain that age or marry under it (all objects of the power); a power of advancement in the trustees (*t*).

The following sub-trusts are probably invalid:

1. On trust for A "on protective trusts" (*pro tanto* invalid as to discretionary trusts under section 33 (1) (ii) which in effect means that the machinery of the section cannot be employed).
2. On trust for A together with any number of other objects of the power on discretionary trusts.

The Trustees' Duty to Consider "Benefit"

It was earlier suggested that some importance must attach to the fact that of the four cases prior to *Re Wills* which accepted the

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1 and 2; lives in being there referred to would continue to mean lives in being under the earlier power of advancement), and Examples 3 and 4 may only be employed if A of the further sub-trust was also a life in being under the earlier power.

Of course, if trustees desire to utilise Example 3 or 4, and A is able and willing to consent to settle on those lines a sum advanced to him out and out, lives in being for the purpose of the sub-trust (its terms and its power of advancement) will be those of necessity in existence at the date of the creation of the sub-trust.

(*q*) No power of advancement was contained in the sub-trust of *Re Wills*.

(*r*) As in *Re Halsted* A was the only object of the power of advancement, it seems more likely that Farwell J. required an ultimate trust for the original trust fund because the wife and children were not also objects. Where the children *are* objects of the power, there seems no reason why they, as ultimate remaindermen, should not take absolute interests. And this, it is thought, would also be so even if possible objects of the advancement power were not, independently of that power, given vested or contingent interests elsewhere in the original trust.

(*s*) No power of appointment can be given to A or his widow; for trustees to give any power of appointment would be an indefensible delegation, and a mere obvious re-writing of the settlor's trusts.

This trust also has the advantage of securing the benefit of (in most cases) all the objects of the power of advancement, in the same way as Wynn-Parry J. required in *Re Meux* that all those interested after the infant (entailed interest) should be protected by the terms of the sub-trust.

(*t*) This trust produces the *in terrorem* effect, of which counsel spoke in *Re Morris*, without employment of s. 33. See Jenkins L.J. [1951] 2 All E.R. 528, at p. 533.

principle of sub-trusts three were concerned with a power *inter alia* to " benefit," and in each case the court saw benefit as stemming from this particular method of exercise of the power. And on a previous occasion (*u*) the present writer pointed out that prior to *Re Vestey* in 1951 *Roper-Curzon* v. *Roper-Curzon* was the only case which contained the suggestion that the method of payment or application may legitimate the exercise of the power.

The argument remains open then that, if payment may be made to the beneficiary for the simple purpose of avoiding estate duty on the life tenant's death, benefit may additionally accrue to the beneficiary from the delegation to sub-trustees of the discretions involved in a discretionary trust. On a proper construction of the power to benefit, " benefit " may permit the employment of the machinery of section 33. During his judgment in *Re Wills*, Upjohn J. said (*a*) that " it would be very regrettable if some policy of the law authorised an out-and-out advance but not an advancement on trusts where the particular circumstances of the case made that method the sensible and practical way of doing it," and it is suggested with respect that it would also be regrettable if future courts faced with this issue were unwilling, under a power to benefit, to permit the use of section 33 where that course might be most beneficial.

That section 33 can be really beneficial was recently demonstrated by *Re Richardson's Will Trusts* (*b*). In that case a testator provided that a protected life tenant should enjoy the income of certain funds until he was 35 years of age, and, on attaining that age, take absolutely. If the discretionary trusts had already come into existence when the beneficiary attained 35, it was provided that a second protective trust should then come into operation for the rest of his life. As Mr. Megarry has recently pointed out (*c*), there may be real advantage in setting up a series of protective trusts, for example, one set until the beneficiary is 25, another from 25 to 35, a third from 35 to 45, and another for the rest of his life (*d*). This may be an ideal way of dealing with possible youthful or temperamental indiscretions which, of course, trustees

(*u*) (1958) 22 *The Conveyancer* (N.S.) 413, at p. 421, footnote (*f*).
(*a*) [1958] 3 W.L.R. 101, at p. 109.
(*b*) [1958] Ch. 504.
(*c*) (1958) 74 L.Q.R. 182.
(*d*) " The result would be that a youthful indiscretion at, say, twenty-two, would not irretrievably condemn the beneficiary to the mere hopes of a beneficiary under a discretionary trust, dependent upon the exercise of the trustees' discretion, but would give him a fresh start when he was twenty-five " (at p. 184). Bankruptcy in youth (or indeed any unwise attempted alienation) would not hamper the older and wiser man. It might also be possible for protective trusts to arise a specified period after the occurrence of a forfeiting event, say, five years.

must consider in exercising a power of advancement. However, it remains to be seen whether the courts will adopt this line of interpretation (*e*).

(*e*) To avoid the present doubts and limitations a power of advancement should include language expressly enabling the trustees to delegate all their powers and discretions of whatever nature.

THE EFFECTIVENESS OF A PRE-EMPTIVE RIGHTS CLAUSE IN A COMPANY'S ARTICLES

By D. G. Rice, m.a., ll.b., ph.d., Barrister-at-Law

The case of *Lyle & Scott, Ltd.* v. *Scott's Trustees* (*a*), which has recently been decided by the Scottish Court of Session, is of considerable interest to those concerned with company law. For it brings into clear focus the whole question of the effectiveness of pre-emptive rights clauses in a company's articles of association. It is intended in the following brief discussion to consider the problem in the light of this recent case, a case which arose out of an attempt by Mr. Hugh Fraser, the millionaire draper, to gain control of a private company by the name of Lyle & Scott, Ltd. But before we consider the wider implications of the decision it is necessary to examine the facts that gave rise to it.

Fraser, through an agent, made to the members of Lyle & Scott, Ltd., an offer of £2 10s. (later increased to £3) for each ordinary share held by them subject to his obtaining a minimum of 75 per cent. of the equity share capital or such lesser proportion as he should deem sufficient for his purposes. Acceptance was to be by delivery of effective and valid transfers, together with share certificates and a general proxy in favour of his nominee, against which the purchase price would be paid. In due course, Fraser obtained on these terms a satisfactory holding. However, prior to the expiry date of the offer the directors of the company had circularised all the members pointing out that if they desired to sell their holdings they must comply with article 9 of the company's articles of association. This particular article, typical of the kind frequently found in the constitutions of private companies, entitled members in accordance with a procedure there laid down to have the first opportunity of purchasing any of the company's shares that might be for sale (insofar as they amounted to more than one per cent. of the total), the price to be determined by agreement or, failing that, by auditor's valuation. The directors insisted on compliance with this clause and when Fraser's offer was accepted in defiance of their demand (*b*) legal action ensued.

(*a*) 1958 S.L.T. 169.

(*b*) But at Fraser's request no valid or effective transfers were actually delivered at the time the purchase price was paid.

The company sought (i) a declaration that the defenders were bound to implement the terms of article 9 by notifying the secretary in writing of their intention to transfer shares and (ii) a decree of the court specifically compelling the defenders to adopt this course. The Court of Session (affirming the interlocutor of the Lord Ordinary) held that although the defenders had committed a breach of article 9 in their arrangement with Fraser, nevertheless the remedy sought by the company was not available to it in that the defenders had not done any overt act indicating to the company an intention to transfer their shares. Accordingly, the company must fail in its action.

A startling feature of *Lyle & Scott* v. *Scott's Trustees* (*c*) is the fact that the ultimate decision is in conflict with the inherent merits of the case. The defenders had acted in flagrant breach of article 9, but were in effect allowed to avoid the consequences of their wrongdoing through the court's inability to compel the terms of that article to be implemented. Indeed, Lord Strachan, the Lord Ordinary, was fully aware of this and it was with some reluctance that he felt obliged to find against the pursuers (*d*). Admittedly, both the Court of Session and the lower court were at pains to restrict their decision to the particular remedy sought and to leave it open to the pursuers to base an action on some other claim. But as it stands, judicial endorsement has been given to a clear breach of an article. For the court has allowed the breach to be committed with complete impunity to the wrongdoers.

In view of the prevalence in the constitutions of private companies of such clauses as art. 9 of Lyle & Scott, Ltd.'s articles of association, it is not unrewarding to evaluate their effectiveness. Does the decision in the *Lyle & Scott* case (*c*) indicate that such clauses are not worth the paper they are written on? It is the purpose of this discussion to consider the problem. But before we can proceed further it is necessary to quote the relevant part of the particular clause that fell to be construed in the *Lyle & Scott* case (*c*). Art. 9 of the articles of association provides *inter alia* as follows:

> "9. Subject to the provisions of clauses 7, 8 and 12, no registered holder of more than one per centum of the issued ordinary share capital of the company shall, without the consent of the directors, be entitled to transfer any ordinary shares for a nominal consideration or by way of security, and no transfer of ordinary shares by such a shareholder shall take place for

(*c*) *Supra.*
(*d*) See *ibid.*, p. 173.

> an onerous consideration so long as any other ordinary shareholder is willing to purchase the same at a price which shall be ascertained by agreement between the intending transferor and the directors and failing agreement at a price to be fixed by the auditor of the company for the time being. Any such ordinary shareholder who is desirous of transferring his ordinary shares shall inform the secretary in writing. . . . "

Now one pointer in favour of the efficacy of the above clause was readily hit upon by the court. The word " transfer " was not to be construed as applying solely to the mechanics of registration. It covered " an agreement to transfer " quite as much as the actual transfer itself.

The court arrived at this conclusion in the light of the following considerations. In the first part of the article, if the word " transfer " were narrowly interpreted, then its meaning would in effect be covered by another article, *viz.*, art. 7, which required all registrations of transfers to be approved by the directors. Clearly, then, " transfer " had to include an agreement to transfer and prima facie at any rate the same interpretation should be adopted in the immediately following and vital part of the article. But in the court's view the actual language there employed put the matter beyond doubt. In the words of Lord Clyde (*e*):

> " [The article] provides that ' no transfer of ordinary shares shall take place for an onerous consideration so long as any other ordinary shareholder is willing to purchase the same at a price ' to be ascertained in a certain way. The reference to other shareholders being willing to purchase the shares clearly shows that the ' transfer ' referred to must include an agreement for the sale of a share, otherwise the introduction of the word ' purchase ' would be meaningless. Similarly, it would follow that when the word ' transfer ' is used in the pre-emption clause in the article it must have the same extended meaning. It was argued that the word ' shall ' in this article is not imperative but had merely a future outlook, and involved no element of obligation. But I feel quite unable to give a plain word other than its usual and obvious meaning."

This wide interpretation of the clause had one important effect. It killed the argument that, although the defenders were powerless to transfer the legal interest in the shares, they were not so restricted in the disposition of the beneficial or equitable interest. The court clearly held that the defenders were not trustees for the purchaser. The pre-emptive rights conferred by the clause were

(*e*) At *ibid.*, p. 177.

such as to prevent the transfer of any interest equitable or legal to an outsider in the absence of strict compliance with the terms of the clause. The contract that Fraser had purported to make through his agent was legally quite ineffective. The arrangement had of necessity to be subject to the articles and as both parties knew or were deemed to know the contents of the articles the compact was totally invalid.

Moreover, although *Lyle & Scott, Ltd.* v. *Scott's Trustees* (*f*) was, of course, a Scottish case, it is nevertheless submitted that the various judicial pronouncements there made on the effectiveness of pre-emptive rights clauses apply to the law of England no less than that of Scotland. Admittedly, the English authority *Hawks* v. *McArthur* (*g*) might cast doubt on this last assertion (*h*). For in this case, despite the fact that the agreement there entered into for the purchase of shares was made in total disregard of the company's pre-emptive rights clause, the court nevertheless held that the giving of executed transfers in exchange for the agreed purchase price had the effect of passing to the purchaser the equitable, though not the legal, interest in the shares.

However, against this two considerations should be borne in mind. First, the *Hawks Case* (*g*) was cited to the court in *Lyle & Scott, Ltd.* v. *Scott's Trustees* (*f*) and was distinguished by Lord Clyde (*i*) on the grounds that the pre-emptive rights clause was in materially different terms from article 9 of the latter case (*k*). Although it is difficult to see how the two clauses do in fact differ materially, it is nevertheless quite clear that the court did not attempt to distinguish *Hawks* v. *McArthur* (*g*) on the grounds that it was a decision of the English court and therefore of very limited significance in the Scottish Court of Session. The law on the subject was throughout treated as the same for both countries (*l*). But of more direct bearing is the recent Malayan case —*Gan Sin Tuan* v. *Chew Kian Kor* (*m*)—with its interesting

(*f*) *Supra.*

(*g*) [1951] 1 All E.R. 22.

(*h*) No guidance can be got from the earlier House of Lords case *Hunter* v. *Hunter* [1936] A.C. 222. Although certain dicta were there expressed bearing on the problem, they are directly contradictory. Compare the opinion of Lord Hailsham L.C. at p. 249 (in which he supported the free disposition of *beneficial* interests) with the opposite viewpoint of Lord Atkin at p. 261.

(*i*) Who was implicitly supported in this respect by Lord Russell at p. 180.

(*k*) It was also distinguished on the grounds that in *Hawks* v. *McArthur*, *supra*, "it was a matter of admission . . . that the rights of the purchasers of the shares, whatever precisely they were, were equitable rights. In this case, on the contrary, it is strenuously denied that there were any such rights at all."

(*l*) Certainly so by Lords Russell and Sorn. Lord Clyde is a little more guarded, reserving his opinion as to the validity in Scotland of the distinction between legal and equitable rights in shares.

(*m*) (1958) 24 M.L.J. 62.

majority decision, a decision which was arrived at before *Lyle & Scott, Ltd.* v. *Scott's Trustees* (*n*) had been fully reported and is therefore essentially the fruit of independent thought. The facts of this case were briefly as follows. An agreement was entered into in breach of the terms of a pre-emptive rights clause, under which A agreed to sell his shareholding in a certain company to B, and received from him the purchase price in exchange for the relevant share certificate. A, however, refused to execute any transfer and later his solicitors wrote repudiating the agreement as being in breach of the articles and therefore bad in law, and offering to return the purchase price. B, however, declined to accept any such repudiation and had recourse to the courts. Although he succeeded in the court of first instance he lost on appeal by a majority decision, it being held (i) that inasmuch as the agreement for the sale of the shares was in breach of the restriction imposed by the articles of association it was totally void, no rights arising under it legal or equitable and (ii) that, since the sale purported to be a disposal of the legal and equitable interests in the shares, it could not be construed as a mere sale of the equitable rights only, which would take free of the provisions of the pre-emptive rights clause.

Although Rigby J., the trial judge, and Thomson C.J. on appeal held that the beneficial interest in the shares had in fact passed to the purchaser, the case being on all fours with *Hawks* v. *McArthur* (*o*), the majority members of the appellate court firmly rejected this contention. Whyatt C.J. considered the matter at length. He held strongly that the agreement, being in breach of the articles, was void and that any purported attempt to convey the legal and equitable interests in the shares could not be construed so as to confer only the latter. By way of corollary he clearly stated that had the sale expressly related to the beneficial interest " the restrictive provisions of the articles would not apply." As for *Hawkes* v. *McArthur* (*p*), on which Rigby J. and Thomson C.J. had based their judgments, this was distinguishable on the grounds that there an implied or constructive trust had been created by the execution of a transfer, and under this trust, which in no way owed its existence to the agreement irregularly entered into, the transferor had to be regarded as a bare trustee for the transferee (*q*). In contrast in *Gan Sin Tuan* v. *Chew Kian Kor* (*r*)

(*n*) *Supra.*
(*o*) *Supra.*
(*p*) *Supra.*
(*q*) In accordance with the dictum of Chitty J. in *Loring* v. *Davis* (1886) 32 Ch.D. 625, at p. 634.
(*r*) *Supra.*

no transfer had ever been executed and the rule of the implied or constructive trust could not therefore be invoked. The appellant could not be regarded as holding the shares for the benefit of the respondent either on the basis of the agreement or any principle arising independently of the agreement.

However, this distinction drawn by Whyatt C.J. is, it is submitted, open to criticism. For its consequence is to make the effectiveness of the pre-emptive rights of the other shareholders dependent on whether or no the infringer of these rights actually executes a transfer. It is difficult in principle to justify this position. Nevertheless, however much Whyatt C.J.'s distinction may be open to criticism, there is no disputing the fact that both in Scotland and Malaya *Hawks* v. *McArthur* (*p*) has been rejected as authority for accepting an agreement, which purports to transfer shares in contravention of the terms of a pre-emptive rights clause, as a valid means of conveying equitable interests.

Admittedly, *Gan Sin Tuan* v. *Chew Kian Kor* (*r*) is weaker in one respect than *Lyle & Scott, Ltd.* v. *Scott's Trustees* (*s*). For it expressly concedes that where an agreement to transfer purports to convey only the equitable interest, no attempt being made to embrace the legal interest as well, the restrictions imposed by a pre-emptive rights clause do not apply. However, the *Lyle & Scott Case* (*s*) does not permit this relaxation and even according to the decision in *Gan Sin Tuan* v. *Chew Kian Kor* (*r*) for the agreement to shake free of the pre-emptive rights clause there must be no doubt that it is only the beneficial interest in the shares that it is intended to pass (*t*).

But reverting specifically to *Lyle & Scott, Ltd.* v. *Scott's Trustees* (*s*) an obvious consequence of the court's decision was that since neither party to the agreement was legally or equitably bound, the purchaser could reclaim his purchase price and the defenders could rescind their proxies and demand the return of their transfers and share certificates. However, in this particular case neither party had any wish to discontinue the arrangement, irregular though it might be. It was the company which was

(*s*) *Supra*.

(*t*) Moreover, even if the above submission that the judgments in the *Lyle & Scott* case, *supra*, truly represent the law of England is rejected, and if an equitable interest in shares can in fact be transferred in the absence of due compliance with the provisions of a pre-emptive rights clause, it is nevertheless undisputed that the legal interest cannot be so transferred. And as the legal owner is not obliged to vote in accordance with the wishes of the holder of the equity interest (even if the beneficial owner is given a general proxy, it is always revocable), the purchaser's control of the company—the vital point at issue—remains dependent on the co-operation of the vendor until he adopts one of the courses discussed, *post*, at pp. 49–51.

directing its attentions to that end. Nevertheless, in assessing the effect of any particular tactical move the invalidity of the arrangement must not be forgotten.

Before we proceed further, however, we must refer again to the actual decision of the case. The court firmly held that article 9 was not a compulsitor but only a restriction on the right to dispose of shares. Thus, the defenders were not compelled to sell their shares in the absence of an unequivocal intimation to the company in some overt manner that this was their intention (*u*). Moreover, the fact that they had entered into the arrangement with Fraser that they had was not evidence that they intended to sell their shares on the terms laid down in art. 9 providing as it does (*inter alia*) for the determination of the price by agreement or arbitration. It is one thing to agree to sell if a firm offer is made of £3 a share; it is quite another if the price is totally unknown and therefore quite speculative. Furthermore, had the defenders even gone as far as to declare to the company their desire to sell, it seemed to the court in the light of *Smith* v. *Wilson* (*a*) quite probable that they could withdraw at any time before the transfer had been completed. Accordingly, it is clear that a pre-emptive rights clause is purely restrictive and does not act as a compulsitor.

The Company's Remedies

Now having considered the position obtaining between the purchaser and vendor of shares where a pre-emptive clause exists and an agreement to sell has been effected in defiance of its terms, it remains for us to discuss what remedy is available to the company for breach of its articles (*b*). Although from a legal standpoint the company's action will be directed against those members who have illegally sold their shares, it must be remembered that commercially the company's real concern is not with the wrongdoing of the latter *per se*, but with the effect of their wrongdoing. It is the *control* of the company that is of vital interest to all its members.

(*u*) No valid or effective transfer had in fact been delivered: see n. (*b*) at p. 42.

(*a*) 9 S.L.T. 137.

(*b*) The extent to which individual members can bring an action in support of their rights of pre-emption is uncertain. It will depend upon whether the articles of association constitute a contract between the members *inter se* as well as between the company and the members. For a discussion of this problem see the writer's article in (1957) 21 *The Conveyancer* (N.S.) p. 433. Unfortunately, the *Lyle & Scott* case throws no light on this particular point. Although Lord Russell observed that the articles "constitute a contract between the company and its members, embodying covenants on the part of each member to observe their provisions; and they regulate the rights of members *inter se*," the dictum is equivocal in that it is not clear whether "the rights of members *inter se*" are regulated by direct action between members or only through the medium of the company.

Accordingly, in discussing the company's remedy the question should be considered in terms of how to prevent control passing into outside hands rather than in how to compensate the company for the wrongdoing of those members who have acted in breach of the articles. At first sight the company's position *vis-à-vis* the *de facto* purchaser of its shares would appear to be strong. For since the vendors cannot transfer any interest in their shares, equitable or legal, the purchaser theoretically can have no say in the company's affairs. The membership remains as it was, and the purchaser has parted with his money all to no purpose (though he can claim it back from the vendors). Dividends are still payable to the persons named on the register of members, and, even if these sums are voluntarily transferred by the members to the purchaser, tax problems of some magnitude may easily arise (*c*) quite apart from considerable inconvenience. The company's position *vis-à-vis* the purchaser is indeed very satisfactory.

The Purchaser's Position

However, a qualification must be added to what has just been said. The position of the purchaser is strengthened out of all recognition the moment he acquires sufficient proxy votes to enable him to dominate at the company's general meetings. For once he can do this, the opportunity is his to attempt to mould the company's constitution or adopt any other device in order to regularise his position. But how will he set about the problem?

The most obvious method is to engineer the passing of a special resolution altering the particular article which confers on the existing members pre-emptive rights (*d*). For if this can be done, then the purchaser will be free to take a valid transfer of the shares he has irregularly contracted to purchase. Admittedly, the transfer will have to meet with the approval of the directors (*cf.* art. 3 of Pt. II of Table A), but if he can bring about the passing of a special resolution he can *a fortiori* control the composition of the board of directors and thereby ensure consent to any transfer. However, although this method of regularising his position and obtaining legal control of the company may seem obvious and simple, it is doubtful whether it will be legally effective. For to be valid a resolution purporting to alter the articles of association must be entered into bona fide for the benefit of the whole company,

(*c*) In that the recipient members may be liable for surtax on money they never actually enjoyed. Moreover, it is doubtful whether this difficulty can be overcome by means of seven year covenants.

(*d*) See the Companies Act, 1948, s. 10.

i.e., for *all* the members and not merely some of them (*e*). Now in the hypothetical case we are considering, quite clearly the purchaser would be passing the special resolution (*f*) not for the benefit of the shareholders as a whole, but simply for his own benefit (*g*). In fact the alteration would operate to the distinct detriment of the other members. Accordingly, it is submitted that a purported alteration of the articles brought about in this way would be quite ineffective.

SPECIAL RESOLUTION

Nevertheless, it must be freely admitted that this conclusion is somewhat weakened by the decision in *Greenhalgh* v. *Arderne Cinemas, Ltd.* (*h*). For there a special resolution which altered a pre-emptive rights clause so as to enable shares to be transferred in defiance of its terms provided only that the sanction of an ordinary resolution were obtained, was held to have been validly passed. Although the court re-stated the principle that any alteration of the articles must be "bona fide for the benefit of the company as a whole," and attempted to interpret this phrase in those cases where there were different class interests existing within one company, by the following converse proposition, *viz.*, that

> "a special resolution of this kind would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and the minority shareholders so as to give the former an advantage of which the latter were deprived,"

the court's application of the facts of the case to the principle so readily accepted is somewhat puzzling. For clearly the effect of the special resolution was to enable the majority freely to sell their shares to an outsider without any such power being reserved to the minority. But, however surprising the actual decision in the *Greenhalgh Case* (*i*), the principle on which it purports to be based is quite clear and in fact accords with that laid down in

(*e*) See Lindley M.R. in *Allen* v. *Gold Reefs of West Africa* [1900] 1 Ch. 656 (C.A.), at p. 671; Astbury J. in *Brown* v. *British Abrasive Wheel Co.* [1919] 1 Ch. 290, at p. 296; Scrutton L.J. in *Shuttleworth* v. *Cox Bros. & Co.* (*Maidenhead*), *Ltd.* [1927] 2 K.B. 9 (C.A.), at p. 23; and Evershed M.R. in *Greenhalgh* v. *Arderne Cinemas, Ltd.* [1951] Ch. 286, at p. 291. The question is discussed by the writer in (1958) 22 *The Conveyancer* (N.S.), at pp. 171–176.

(*f*) In his capacity as the proxy nominee of the members whose shares he had purported to purchase.

(*g*) Or more accurately for the benefit of those particular members who had sold their shares to him in breach of the articles and who would, if the resolution were validly passed, be in a position to regularise and execute their contract.

(*h*) *Supra.*

(*i*) *Supra.*

the earlier cases. And if we apply this principle to the facts of *Lyle & Scott, Ltd.* v. *Scott's Trustees* (*k*) we cannot, it is submitted, avoid the conclusion that any alteration of the pre-emptive rights clause in the circumstances postulated would be a fraud on the minority and hence invalid.

The second method of evading the consequences of a pre-emptive rights clause consists in the passing of a special resolution for the winding up of the company and in distributing the realised assets to the members (*l*). For those members who have sold their shares can then forward the sums received to the purchaser. However, this method is both dangerous and clumsy. For first, if the members who have sold their shares receive in cash for passing on to the purchaser more money than they themselves obtained for their holdings—and unless this is the case the purchaser will have wasted his efforts—they may be tempted to retain for themselves the realised proceeds of the liquidation, particularly as their obligation to the purchaser is simply moral and in no sense legal (*m*). Moreover, an enforced winding up of the company may easily bring about heavy losses. Perforce the goodwill must be lost, and indeed the physical assets when no longer regarded as integral parts of a living enterprise may have little market value. Furthermore, the process of realising assets is by its very nature apt to involve considerable delay, and, needless to say, the more protracted the period of time in question the greater are the chances that certain members may die or their whereabouts become unknown with all the complications that this may entail. Accordingly, to engineer the passing of a special resolution for the liquidation of the company will not generally be a very acceptable method to a purchaser of getting round the effect of a pre-emptive rights clause.

We now come to the third and (it is submitted) the one really effective method of avoiding the consequences of the kind of article under discussion. It is in essence the same as the second method except that it is without its inherent weaknesses. The purchaser will proceed with a scheme brought under section 287 of the Companies Act, 1948. For under this section if a winding up of the company has been resolved upon and it is proposed to sell the undertaking to another company in exchange for shares in the latter, then subject to the sanction of a special resolution (*n*) the

(*k*) *Supra.* (*l*) See the Companies Act, 1948, s. 278 (1) (b).

(*m*) This is, of course, on the assumption that the purchaser is without any equitable as well as legal right in the shares.

(*n*) Dissentients have their protection in subs. (3) of the section which provides that their shares shall, if they so elect, be compulsorily purchased at valuation. But for an assessment of the effectiveness of this protection, see the writer's article in (1958) 22 *The Conveyancer* (N.S.), p. 435.

liquidator can distribute these shares among the members of the transferor company. Accordingly, if the purchaser of shares, on whose transfer a restriction is placed similar to that contained in art. 9 of the articles of association of Lyle & Scott, Ltd., should first form a company free of the restriction in question and then under section 287 convey to it the undertaking of the original company, he would be in a position to accept a transfer of the new shares which would be allotted under the scheme to the members of the transferor company. For the transferee company would not be hampered by articles of association which imposed the restriction complained of and hence the new shares could be freely transferred from the members to the purchaser. Any obstruction on the part of the directors in the form of a refusal to consent to the registration (*o*) could easily be met by a change in the composition of the board to ensure its co-operation.

This method of avoiding compliance with a pre-emptive rights clause is far superior to a straightforward winding up of the company and a distribution of its assets. For first, the temptation otherwise open to the members of disregarding their arrangement with the purchaser and retaining the cash distribution (even at the expense of returning the purchase price) is entirely removed. What will be received will consist not of hard cash but of intangible securities whose worth will be no easier to assess than that of the shares originally sold to the purchaser. And secondly, resort to a scheme under section 287 dispels the need to destroy the undertaking which would, of course, be inevitable in a winding up. As we have explained, a liquidation will of necessity mean a total loss of goodwill and may even cause tangible assets to be realised at but a fraction of their worth as integral parts of an existing organisation (*p*).

Conclusion

We are now in a position to assess the effectiveness of a pre-emptive rights clause in a company's articles of association. Essentially, such a clause imposes a very severe restriction on the transferability of shares. For failure to comply with its terms will clearly render any purported transfer or agreement to transfer totally ineffective.

(*o*) In private companies it is normal for the consent of the directors to be required before a transfer of shares can be registered: *cf.* art. 3 of Part II of Table A.

(*p*) Although in theory it is possible to envisage a winding up where the undertaking is sold for cash as an undivided entity—the normal commercial method of avoiding the break-up of an enterprise is simply to sell its shares—the danger would still remain of the recipients of the cash retaining it rather than forwarding it to the purchaser of their shares.

However, this is not the same thing as saying that because shares cannot be transferred unless the provisions of a pre-emptive rights clause have been complied with, any attempt in this direction will result in the compulsory transfer of the shares in question to those entitled to the benefit of the pre-emptive rights clause. The clause is purely restrictive and not a compulsitor. Accordingly, as the clause confers no *positive* powers on the members, but only operates negatively, its effectiveness will depend on the ability of the purchaser of shares sold otherwise than in compliance with the clause to avoid the consequences of the restriction. And this in turn will depend on whether the purchaser can command, through the general proxies he holds, sufficient voting power to bring about the passing of a special resolution. If he cannot, his position is hopeless and the pre-emptive rights clause is fully effective. But if he can ensure the passing of a special resolution, three alternative courses present themselves to him.

First, he can attempt to alter the articles of association as far as relates to the pre-emptive rights clause, though it is doubtful whether he will be able to satisfy the court that the resolution was passed bona fide for the benefit of the company as a whole. Or secondly, he can wind up the company and indirectly through the members from whom he purchased his shares he can receive the realised assets. But an enforced liquidation may well result in a substantial financial loss thereby prejudicing the whole object of the original purchase, and, in addition, the direct distribution of hard cash to the members who sold him their shares offers, if the sum in question is greater than the purchase price, an almost irresistible temptation to repudiate the bargain, return the purchase-money and keep the sum received on the liquidation. Finally, the purchaser may proceed with a scheme under section 287. He can thereby avoid an actual break-up of the enterprise, and prevent hard cash being received by the members from whom he purchased his shares. Instead the existing members will receive, in exchange for the undertaking, shares (whose market value is problematical) in the transferee company, and, as this company will not be affected by a pre-emptive rights clause, it can impose no restriction on the free transfer of the new shares to the purchaser. It is clear, then, that a pre-emptive rights clause is of little effect against a purchaser who is able to control the passing of a special resolution and use the device of a scheme brought under section 287.

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, ll.b., Solicitor

Richards v. *Richards* [1958] 1 W.L.R. 1116;
[1958] 3 All E.R. 513 (C.A.)

Matrimonial home—dispute between husband and wife—purchase by wife and her parents—allotments by serving officer—advancement—Married Women's Property Act, 1882, *s.* 17.—Once more the Court of Appeal has had to attribute legal significance to imprecise financial dealings between husband and wife at a time when the subsequent breakdown of the marriage was not contemplated. Such arrangements do not normally give rise to enforceable contracts (*Balfour* v. *Balfour* [1919] 2 K.B. 571), but the court must always adjudicate on title or, if on the evidence this is impossible, make a division in exercise of its discretion under the Married Women's Property Act, 1882, s. 17 (see *Silver* v. *Silver* [1958] 1 W.L.R. 259; [1958] 1 All E.R. 523, noted *ante,* Vol. 22, p. 225; *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63).

The marriage here lasted from 1943 to 1956. During all this time the husband, a naval officer only intermittently at home, made from his pay regular allotments (described as generous) to his wife, and in 1948 transferred a sum of £150 from his Post Office savings account to hers. Until 1949 the wife, and a daughter born in 1944, lived in her parents' house. In 1949 the wife and her parents, without the husband's foreknowledge, combined to purchase a house as a home for both families. On hearing of this the husband wrote approving whole-heartedly, asked the wife to accept the £150 mentioned above as a contribution to her capital, and increased the allotment from £28 per month to £34. (In 1950 and 1952 he made further increases to £38 and £42 respectively.) At the time of the purchase the husband was referring in letters to the wife's "commitments." The husband now claimed to be entitled to a share in the house.

The Court of Appeal (Hodson, Morris and Ormerod L.JJ.) held, in a judgment delivered by Morris L.J., in which the other members of the court concurred:

(1) "... the approach to this matter and its determination depend on a consideration of the facts and of such inferences as can properly and reasonably be drawn from them." ([1958] 1 W.L.R. at p. 1122; [1958] 3 All E.R. at p. 517.)

(2) As there was neither any joint plan to purchase a matrimonial home between husband and wife, nor any foreknowledge by him, the husband did not acquire any interest at the time of the purchase. The prima facie conclusion, not here rebutted, was that savings from the allotments belonged to the wife, because this was a general allowance for all her needs and not merely a housekeeping allowance (distinguishing *Blackwell* v. *Blackwell* [1943] 2 All E.R. 579, where savings by a wife out of housekeeping money were held to belong to her husband).

(3) On the same principles, the husband did not subsequently acquire any interest. The increases in allotments were again in effect advancements to the wife.

Once more, as in *Silver* v. *Silver, supra,* the basic presumption of advancement has been applied. But the Court of Appeal has also, it would seem, drawn a distinction between a general allowance, where in the absence of evidence savings belong to the wife, and a housekeeping allowance, where savings prima facie belong to the husband. There is of course room for further distinction—for example, can there be a general allowance if the parties are living together, and does the method of payment (*e.g.,* banker's order as against handing over of cash) make any difference?

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2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Re Sebba (deceased) [1958] 3 W.L.R. 605 at p. 615; [1958] 3 All E.R. 393, at p. 401 (Ch.D.)

Trust—investment clause—meaning of "South African trustee securities."—In this case Danckwerts J. delivered judgment separately on each of three points, and the present note deals only with the third and last, which concerned the construction of an investment clause (for the other points, see *infra,* p. 63).

The testator directed his residuary estate, which was eventually to be held by a trustee bank in South Africa for beneficiaries resident there, to be invested in "South African trustee securities only with power to vary such investments for others of a like nature." Affidavit evidence showed that few South African securities fall within the Trustee Act, 1925, s. 1, that there is no corresponding statutory provision there, but that, subject to any express directions and the general rules of equity (*e.g.,* presumably the trustees' duty to exercise discretion in selection), in practice trust funds can be invested in a reasonable range of securities. On these facts Danckwerts J. held the funds could be invested "in such forms of investment as are regarded by the courts of South Africa or any province thereof as suitable for investment of trust funds."

In the language of private international law, this would seem to be an eminently satisfactory application of the principle of comity and resort to the *lex situs.* Any particularly strict construction of an investment clause is at the present time liable to cause hardship to the beneficiaries whom such clauses are designed to protect.

G. L. Baker, Ltd. v. *Medway Building and Supplies, Ltd.* [1958] 1 W.L.R. 1216; [1958] 3 All E.R. 540 (C.A.)

Trust—breach of trust—following trust property—amendment of pleadings—principles applicable.—The decision at first instance in

this case, by Danckwerts J., was noted *ante,* Vol. 22, at p. 390, from the *All England Reports,* but was not then reported in *The Weekly Law Reports.* It is now included at the reference shown above. The decision of the Court of Appeal is principally concerned with procedure.

Danckwerts J. had, *inter alia,* applied the principle that a person who receives trust money can be compelled to refund it unless he is a purchaser for value in good faith, whether or not there is notice sufficient to make him a constructive trustee (applying the statement of Denning J. in *Nelson* v. *Larholt* [1948] 1 K.B. 339, which followed and perhaps extended the principle of the *Diplock* case—*Ministry of Health* v. *Simpson* [1951] A.C. 251). The defendants now succeeded in convincing the Court of Appeal (Jenkins, Romer and Willmer L.JJ.) that the pleadings had not fully disclosed the nature of the case to be met, that leave to amend the defence so as to plead purchase for value should be given, and that a new trial should be ordered. The judgments, especially that of Jenkins L.J., contain a full and valuable discussion of the functions of pleading and of the principles on which amendment should be permitted. On the substantive law one may remark that the court was very cautious in all references to *Nelson* v. *Larholt, supra.*

B. S. Lyle, Ltd. v. *Rosher and Others* [1959] 1 W.L.R. 8; [1958] 3 All E.R. 597 (H.L.)

Appointment of settled fund on trusts of independent deeds and subject thereto on trusts of original settlement—assignment by purported beneficiary under independent deeds—construction of documents—extent of application of rule in Dearle v. *Hall.*—This case appears to be reported now for the first time, though some differences of opinion in the House of Lords would make a report of the judgments in the Court of Appeal useful.

Under a settlement A. W. (in the report and hereafter in this note called the bankrupt) and his father had a joint power of appointment. In 1933 the bankrupt (then solvent) desired to become a member of Lloyd's, a process which requires the vesting in Lloyd's of funds to discharge underwriting liabilities. To this end part of the settlement funds were appointed to Lloyd's to be held by them on the trusts of two deeds (dealing with different types of insurance) whereby, subject to underwriting liabilities, the property was eventually to be held for the bankrupt absolutely. However, the deed of appointment declared that in this last eventuality the property should be held on the trusts of the original settlement but that Lloyd's should not be concerned with these trusts and might take a good receipt from the bankrupt. All the deeds were duly executed and the investments transferred to Lloyd's. In 1951 and 1953 the bankrupt borrowed money from the appellants, purporting to charge his interest under the two Lloyd's trust deeds and making no mention of the terms of the appointment. On each occasion the appellants asked Lloyd's if they had notice of any other charges and received negative replies. A. W. was now bankrupt and had left Lloyd's. The appellants claimed priority over

the settlement trustees, arguing principally that priority should be determined by the giving of notice to Lloyd's under the rule in *Dearle* v. *Hall* (1828) 3 Russ. 1.

The House of Lords (Viscount Kilmuir L.C., Lord Morton of Henryton, Lord Reid, Lord Cohen and Lord Keith of Avonholm) unanimously dismissed the appeal, thereby confirming the decisions of the courts below. The argument that the documents were sufficiently misleading to require the postponement of the settlement trustees and their beneficiaries was dismissed shortly, especially as counsel conceded that his case was not as strong as *Re King's Settlement* [1931] 2 Ch. 294 or *Abigail* v. *Lapin* [1934] A.C. 491.

All members of the House agreed that, although the bankrupt could give Lloyd's a valid receipt, yet on the proper construction of the documents he never acquired any beneficial equitable interest in the appointed funds at all but was a mere conduit pipe, and if he acquired the funds would hold them for the settlement trustees. Consequently he never had power to create or assign interests in the funds. Viscount Kilmuir L.C., Lord Morton of Henryton and Lord Cohen (with rather reluctant concurrence from Lord Keith) held this finding sufficient to dispose of the appeal. Viscount Kilmuir said, in words echoed in the other judgments: " For the application of that doctrine [the rule in *Dearle* v. *Hall*] there are at least four requirements, namely: a fundholder, someone who has or who has had a beneficial interest, assignee No. 1 and assignee No. 2. I do not know of any case where the doctrine has been applied without there being someone who had at one time a beneficial interest. We were pressed with the argument that, in the classic *Dearle* v. *Hall* case, the assignor has no beneficial interest at the time he makes the second assignment and is, indeed, constructive trustee for the first assignee. I do not think the rule would be restricted beyond its intendment or present effect if it were held to apply only where, at the time of the assignment, the assignor had a beneficial interest *or* had no beneficial interest only because he had voluntarily divested himself of it. Put negatively, the rule does not apply where the assignor had no beneficial interest *and* had not deprived himself of one by voluntarily divesting himself of it." ([1959] 1 W.L.R. at p. 14; [1958] 3 All E.R. at p. 602.) These members of the House therefore found it unnecessary to decide whether the rule in *Dearle* v. *Hall* applied to declarations of trust as well as assignments, though Lord Keith seemed inclined to think that it did, and Lord Cohen to think that it did not. In this connection their Lordships referred to the Scottish case of *Redfearn* v. *Somervail* (1813) 1 Dow. 50 and also *Shropshire Union Railways and Canal Co.* v. *R.* (1875) L.R. 7 H.L. 496, without any definite conclusion as to their effect.

Lord Reid, however, was unable to regard the fact that the bankrupt never had an interest as sufficiently distinguishing this case from the typical *Dearle* v. *Hall* situation, and therefore proceeded to hold that the rule did not apply to declarations of trust as opposed to assignments, distinguishing *Redfearn* v. *Somervail*, *supra*, and relying on the statement of Lord Cairns in the *Shropshire* case, *supra*, at L.R. 7 H.L., p. 505. Lord Reid said, after citing from *Hill* v. *Peters* [1918] 2 Ch. 273: " it would be an innovation in the law of England

to require a *cestui que trust* for his own protection to give notice of the trust in his favour to the person who holds the fund." ([1959] 1 W.L.R. at p. 23; [1958] 3 All E.R. at p. 608.)

All their Lordships emphasised that the rule in *Dearle* v. *Hall* ought not to be extended, referring to *Ward* v. *Duncombe* [1893] A.C. 369.

Several points of interest arise out of this decision. First, it seems clear that the House distinguished the facts from a mere appointment to Lloyd's to discharge underwriting liabilities and subject thereto on the trusts of the settlement. Here there were two stages; the appointment on the trusts of the Lloyd's deeds whereby the bankrupt could become absolutely entitled, and then the further declaration of trust. Consequently, by treating the bankrupt as a mere conduit pipe without any beneficial interest the House has confirmed that a declaration of trust of an equitable interest passes that interest to the *cestui que trust* (see *Timpson's Executors* v. *Yerbury* [1936] 1 K.B. 645; *Grey* v. *Inland Revenue Commissioners* [1958] Ch. 690, and note on this case, *ante*, Vol. 22, p. 141). Secondly, it would appear significant that the power of appointment was joint, so that neither appointor could make the property his own. If the bankrupt had had a several power, then an appointment to a volunteer would still have left the property available to his creditors (*Re Phillips* [1931] 1 Ch. 347). Thirdly, the decision emphasises, as did *Grey* v. *I. R. C.*, *supra*, the uncertainty surrounding the nature of sub-trusts or trusts of equitable interests. With respect, it is submitted that statements that *cestuis que trust* need not give notice to trustees to preserve their interests may be perfectly valid as between trustees of a legal interest and their immediate beneficiaries, but need not necessarily apply where there is a sub-trust. Then the question is whether the beneficiary under the sub-trust needs to give notice to the trustees of the primary trust. Yet if a declaration of trust of an equitable interest operates as a transfer, a sub-trust may be merely ephemeral—or at any rate no more than a conduit pipe. Further analysis of these problems may become necessary. Lastly, it may be observed that in discussing the ambit of the rule in *Dearle* v. *Hall* no member of the House mentioned its extension to trust interests in real property by the Law of Property Act, 1925, s. 137; moreover, this section and section 138 have removed many of the difficulties of giving effective notice, which induced some of the remarks adverse to *Dearle* v. *Hall* in *Ward* v. *Duncombe*, *supra*.

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3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Re North of England Zoological Society [1958] 1 W.L.R. 1258; [1958] 3 All E.R. 535

Zoological garden—purposes of operation—object clauses.—Public zoological gardens exist, primarily, for educational purposes, though

there may be occasional charges for admission and restaurants may be run in connection with them. There are also private commercially run zoos. The distinction is whether it is the object of the operation to make a profit or whether profits are incidental to a general non-commercial objective and are used for the improvement of the zoo. Here the precise terms of the object clauses are decisive. In the present case Vaisey J. held that a limited company formed to run the Chester Zoo had, as its " main objects " for the purposes of rating law, education and scientific objects, though receipts were derived from ancillary operations. The case on the London Zoo was applied (*Re Lopes* [1931] 2 Ch. 130).

(Theobald 339)

Re Sahal's Will Trusts [1958] 1 W.L.R. 1243 ✓

Endowment and maintenance of Children's Home—illogical distinction.—Lord Evershed M.R., in his dissenting judgment in *Re Cole* [1958] 3 W.L.R. 447, considered that gifts to children's homes run by local authorities for various purposes, *e.g.*, for offenders or neglected children, were clearly charitable, and analogous to many of the objects referred to in the famous " preamble " to the Act 43 Eliz. 1, c. 4. The majority of the Court of Appeal, however, thought that a gift for the benefit of its inmates was too vague to be charitable. Danckwerts J. was placed in a difficult situation in the instant case as a result. One Isaac Sahal devised a house to Salford Corporation to use and maintain as a Children's Home. The learned judge held that he was still free to decide this point without authority and he held it to be charitable. Sahal had also bequeathed the sum of £2,000 to be invested, and the income used " for the benefit " of inmates of the home from time to time, at the discretion of the corporation. The judge was forced to follow the Court of Appeal on this point and held that this gift was not charitable and was therefore void for perpetuity. The simplest way out of this difficulty in future is so to draft bequests of this nature as to make it clear that the discretion of the local authority is limited to the range of what is legally charitable. " Benefit " is too wide an expression. The distinction between setting up a home and benefiting the children may be comparable to that between endowing a hospital and supplying amenities to its patients, such as flowers or radio. The latter is not necessarily a duty of the local authority and therefore difficult to define.

(Theobald 338, 347)

Re Shipwrecked Fishermen and Mariners' Royal Benevolent Society [1958] 3 W.L.R. 701.

Statutory corporation — investment range — subsequent general Act.—As a general rule " *Generalia specialibus non derogant.*" What is the effect of a general Act of Parliament which confers powers on

trustees upon a former special Act conferring more limited powers? Section 1 of the Trustee Act, 1925, lists a number of securities in which trustees may invest trust funds. As *Hood and Challis* point out, the section does not refer to any power of exclusion, as did the Trustee Act, 1893, s. 1, but section 69 (2) of the Act of 1925 provides that the powers conferred by any section of the Act are in addition to powers conferred by any instrument setting up a trust, and may be excluded if a contrary intention is expressed in the instrument. Section 68 (5) defines "instrument" to include a statute. The Fishermen's Society was set up by a special Act of Parliament in 1850. Section 11 of this Act specified a range of investments for its funds, mainly public funds or mortgages of land. Danckwerts J. held that the court had inherent jurisdiction to direct proper investments of the funds of such a body, and could, under section 57 of the Trustee Act, 1925, empower the Society to invest in a wider range of stocks. He regarded the Act of 1850 as positive, rather than exclusive. In the view of the learned judge the whole range of investments referred to in section 1 was already open to the Society. This meant that the Trustee Act, 1925, in its entirety, was applicable to such a body. He therefore authorised investments in recognised commercial companies quoted on the Stock Exchange. Presumably the powers conferred by section 57 apply unless excluded by the special Act (section 69 (2), cited *supra*). But it is hardly feasible for a statute of 1850 to exclude a wide power conferred by Parliament in 1925, so that the general Act does seem here to have frustrated the special Act. The answer must be that times have changed and modern trust practice should be applied; this would probably have satisfied the founders of the Society, who simply incorporated in their Act the usual investment clauses of their own day. Danckwerts J. did not share the qualms expressed *obiter* by Vaisey J. in *Re Royal Society's Charitable Trusts* [1956] Ch. 87.

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4. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re Royce's Will Trusts, Tildesley v. *Tildesley and Others*
[1958] 3 All E.R. 586

Forfeiture of gift to attesting witness—gift accruing after execution and probate—charging clause—Wills Act, 1837, s. 15.—The underlying reason for the forfeiture of gifts to attesting witnesses is a rather confused one. Originally a beneficiary could not attest, so that a will was void if it had to rely on a legatee for its attestation. Then Parliament saved the will but, rather illogically, struck out the gift. If a legatee was guilty of forgery of a will, why should the will be upheld, even minus his own legacy? If, on the other hand, the will was perfectly good, why strike out his gift? It is not as if every layman appreciates that attesting witnesses forfeit their gifts. Nor is it impossible for a forger to forge the names of imaginary attesting

witnesses and thus avoid using his own. This muddle has provided difficult problems for the courts. Common law and equity depend on induction from examples of principles, but where is the principle? In *Thorpe* v. *Bestwick* (1881) 6 Q.B.D. 311 a legatee married an attesting witness after the execution of the will. It was held that she kept her legacy, though she was a wife of a witness and was benefiting under the will. The words of the statute were ignored, on the view that the same mischief did not exist, though a wife might well, it would seem, induce her husband to support the propounding of a will when he might have been able to deny his signature or to prove that there was some formal defect, *e.g.*, the signatures having taken place in the wrong order. In the present case Wynn-Parry J. proceeded more cautiously. A testator, R, made his will in 1933, and it was attested by T and X. The will contained a charging clause, entitling the trustees of the will to charge for their services. The testator died later in 1933 and Z and Y proved his will and became trustees. In 1934 Z died, and, by deed of appointment, T was appointed trustee in place of Z by Y. The question now arose, could T charge for his services? The learned judge held that T was caught precisely by the words of the Wills Act. His charging clause was in the nature of a legacy, and was a benefit under the will, and he had himself attested the will. *Thorpe* v. *Bestwick* was distinguished, though on no very clear principle. Possibly the fact is that Wynn-Parry J. regarded the earlier case as wrong, since he pointed to the risk of collusion (p. 589) and hinted at the difficulty judges would have if every case under section 15 had to be analysed to see whether it offended the spirit of the Act. One must respectfully sympathise with this point of view, since the true intendment of section 15 is so impenetrable.

(Theobald 116)

Re Cutcliffe's Estate, Le Duc v. *Veness*
[1958] 3 W.L.R. 707; [1958] 3 All E.R. 642

Undue influence — contentious probate — costs.—The House of Lords have emphasised the need of vigilance by courts to see that testators are free and fully informed when they make their wills (*Re Wells, Wintle* v. *Nye*, not yet fully reported). In the instant case C. had made a will in favour of defendant V. During his last illness, but while he was found to have been sane, C. signed another will which had been drawn up and brought to him for signature by L. V. sought to have this last will set aside so that the other will could remain in force, and alleged that L. had forced it on the testator. Two forms of evidence were offered. Witnesses claimed they had overheard L. shouting at the testator to sign the will when he was unwilling to do so. There was also a signed but unattested memorandum executed shortly after the signature of the last will, in which the testator disavowed the will as his act. Collingwood J. disbelieved the defendants' witnesses' oral testimony about the circumstances of the execution of the will and found for the will. The defendants began an appeal on

the merits but this was withdrawn and the Court of Appeal were only concerned with the issue of costs. The court made the defendants pay their own costs, as this was a contentious matter in which the failure of their evidence had been responsible for the result. The effect of the unattested document was not considered vital, and there was no "fault" on the part of the testator which could throw the costs onto the estate (distinguishing *Orton* v. *Smith* (1873) 3 P. & D. 23, which, with respect, seems very close to this case). The scrambling of relatives with ready-made wills to deathbeds is a very unedifying spectacle. Possibly the effect of the decision in *Re Wells* will enable courts to take a stronger line with such cases, and bring them more into accord with the rather more satisfactory rules of the law of contract.

(Theobald 32)

Re Bacharach's Will Trusts
[1959] 2 W.L.R. 1; [1958] 3 All E.R. 618

Badly drafted gift "until" an event—words supplied and re-arranged—indefinite gift of income amounting to absolute gift of capital.—A careful perusal of a document before it is executed would save much expense in litigation. Draftsmen should consider whether they have really tied up the dispositions with which they are entrusted. In this case a will was formally drafted, but in a rather confusing way. Residue was left on trust for sale, the proceeds to be held on trust to pay the widow half the income of the estate and to pay the children the other half until the two children attained the age of 23 or one attained that age and the other died under it, and thereafter dispositions were made of the "children's half" but nothing was said about the widow. If both children predeceased the testator the will provided that the widow was to have the whole estate. The will also provided that the testator's business was not to be sold without the consent of the widow. Vaisey J., reading the will as a whole, was satisfied that the widow was meant to have at least the income of half the estate indefinitely, which amounts to a gift of capital. Had the gift been worded in a slightly different way this would appear expressly on the will and he felt entitled to "reshuffle" the existing words in order to achieve this result. This saved having to resort to the more Trojan tactic of writing into the will a clause about the fate of the widow's half following the attainment of the age of 23 by the children, since the references to ages could be limited to the children's half, thus: to my wife one-half, and to the children the other half until, etc. The words of an Act of Parliament had been thus reshuffled in *Love* v. *Norman Wright (Builders), Ltd.* [1944] K.B. 484. Previous cases on supplying words and dealing with indefinite gifts were cited: such as *Re Follett* [1955] 2 All E.R. 22, see 19 *Conveyancer* 227; *Re Whitrick* [1957] 2 All E.R. 467, see 21 *Conveyancer* 308.

(Theobald 642)

Re Sebba, Lloyds Bank v. *Hutson* [1958] 3 W.L.R. 605; [1958] 3 All E.R. 393

Administration of assets—foreign estate duty—British duty on foreign shares.—This case is mainly concerned with revenue matters but may be mentioned for its general illustration of the resulting problems of administration. A testator died domiciled in England but owner of Canadian shares. These attracted two types of duty, local Ontario and Canadian succession duty on the shares, and English estate duty on the value of the shares as part of the estate (with certain allowances for the duty paid in Canada). The shares were not specifically bequeathed by the will; hence it was held that the Canadian duty fell on residue and not on specific legatees of property or on pecuniary legatees, as an expense of getting in assets of the estate (applying dicta of Jenkins L.J. in *Re Goetze* [1953] Ch. 96). So far as these shares, however, attracted general estate duty here, all legatees under the will had to contribute rateably, and the general scheme laid down in the Schedule to the Administration of Estates Act, 1925, did not apply as it would have applied to local property here, which vested in the personal representatives under English law (*cf. Re Orford* [1896] 1 Ch. 257).

(Theobald 698)
And see *ante*, p. 55.

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5. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

Regis Property Co., Ltd. v. *Dudley* [1958] 3 W.L.R. 647; [1958] 3 All E.R. 491 (H.L.)

Rent Acts—Act of 1957—*rent limit—appropriate factor—fair wear and tear.*—The House of Lords has now heard an appeal from the decision of the Court of Appeal in this case (noted at Vol. 22, p. 236), in so far as it related to the fixing of the "appropriate factor" under section 1 and the First Schedule of the Rent Act, 1957. There was no appeal from that part of the decision which related to the calculation of a reasonable charge for services.

With regard to the fixing of the "appropriate factor" the House decided (by a majority of three to two) that the county court judge had not erred in principle in including, amongst the repairs for which the tenant was responsible under the terms of the tenancy, repairs for which he would have been responsible at common law quite apart from the agreement. Viscount Simonds, Lord Morton of Henryton and Lord Tucker all expressly adopted the unanimous reasoning of the Court of Appeal on this point. If this view leads to an anomalous result, in that it puts a premium on a tenant's negligence, that, in the view of Viscount Simonds and Lord Tucker, is an anomaly created by the language of the Act.

It was pointed out, however, that before one can estimate the amount which a tenant is likely to have to spend on repairs in order to comply with the terms of his tenancy, it is necessary to assume a hypothetical tenant of a particular type, since the amount of expense incurred by any individual tenant must depend to some extent upon the personal behaviour of that tenant; and much of the discussion in the House of Lords was concerned with the type of tenant whom it is necessary to assume in order to calculate the "appropriate factor" correctly. Upon this point opinions were divided. It was agreed that the hypothetical tenant must be reasonably careful. In the view of the majority, however, even a reasonably careful tenant cannot be relied on to be careful all the time. The hypothetical tenant, in the view of Lord Tucker (with whom Viscount Simonds fully agreed) "must be the ordinary average man with all his imperfections and liability occasionally to fail to maintain that standard of care which the law requires of him in his relation to his neighbours." Lord Keith of Avonholm and Lord Denning, however (dissenting), preferred to assume a tenant who is never guilty of negligent or untenantlike conduct.

It was also argued (relying on *Taylor* v. *Webb* [1937] 2 K.B. 283) that a "fair wear and tear exception" in a tenant's repairing covenant renders the tenant's liability for repairs negligible, so that the county court judge also went wrong in principle in crediting the tenant with more than a nominal amount in respect of his repairing liability under the present agreement. Upon this point the House was unanimous in preferring the views of Talbot J. in *Haskell* v. *Marlow* [1928] 2 K.B. 45, 58, to those of the Court of Appeal in *Taylor* v. *Webb*. Upon the very special facts of *Taylor* v. *Webb* the actual decision in that case may well have been correct; but in so far as the Court of Appeal purported to overrule *Haskell* v. *Marlow* their decision cannot be supported. A tenant who is relieved from liability for "fair wear and tear" is still bound (in the words of Talbot J.) "to do such repairs as may be required to prevent the consequences flowing originally from fair wear and tear from producing others which wear and tear would not directly produce."

Phillips v. *Price* [1958] 3 W.L.R. 616;
[1958] 3 All E.R. 386 (Ch.D.)

Leasehold Property (Repairs) Act, 1938—breaches of repairing covenants—application for leave to proceed—matters to be proved—exercise of discretion.—This was an application by a landlord under the Leasehold Property (Repairs) Act, 1938, for leave to bring an action for breach of repairing covenants contained in a lease for eighty years from 1882 of a tenement property in Southwark. In 1955 the applicant, who had acquired the freehold reversion a year earlier knowing that the London County Council were proposing to develop the area, served a notice to repair under section 146 of the Law of Property Act, 1925, on the first respondent. The first respondent immediately served a counter-notice under the Act of

1938, and in February 1956 he assigned the lease to the second respondents, a company of which the first respondent was secretary. In October 1956 the applicant served a notice to repair on the company, who also served a similar counter-notice. In 1957 the area was declared a clearance area and in November 1957 the council served a compulsory purchase order under section 43 of the Housing Act, 1957; but at the date of the hearing the order had not yet been confirmed by the Minister. The premises, as was largely admitted, had been allowed by the respondents in breach of their repairing covenants to fall into a serious state of disrepair. The question was whether the applicant had succeeded in bringing his case within the terms of section 1 (5) of the Act of 1938, so as to make it possible for the court to give him leave to proceed.

It was first argued, as a preliminary point of law, that leave cannot be granted unless a landlord proves either (1) all the matters set out in paragraphs (a), (b), (c) and (d) of the subsection or (2) "special circumstances" within the meaning of paragraph (e). Harman J. held, however, that, even though the word "or" does appear only between paragraphs (d) and (e), all five paragraphs are alternative to each other, so that it is sufficient for a landlord to bring his case within any one of them. But even then, he held, the court has a discretion whether to grant or withhold relief in any particular case.

Upon the facts of the case the learned judge held that there were no "special circumstances" rendering it just and equitable that leave should be given within the meaning of paragraph (e). The risk of clearance and compulsory purchase orders ought always to be contemplated by a purchaser of slum property of this nature; and the assignment of a lease to a company with a view to avoiding personal liability is a normal expedient in this type of case. But the applicant had made out a case under both paragraph (a) and paragraph (c), and there was no reason why the court should exercise its discretion against him. Leave to proceed was therefore granted.

Vienit, Ltd. v. *W. Williams & Son (Bread Street), Ltd.*
[1958] 1 W.L.R. 1267; [1958] 3 All E.R. 621 (Ch.D.)

Assignment or underletting—sublease—covenant not to assign or underlet without consent of landlord or superior landlord—refusal of consent on ground of refusal by superior landlord—whether reasonable—superior landlord not before the court.—A sublease contained a covenant by the sub-tenants "not at any time during the said term to assign part with possession or underlet lend deal with or grant any exclusive right of user of the demised premises or any part thereof without the previous consent in writing of the lessors or their superior lessors which consent shall not be unreasonably withheld in the case of a respectable and responsible assignee or underlessee." The head lease contained a covenant in similar terms against assigning or underletting without the consent of the head landlords. The sub-tenants wished to assign the sublease (subject to a further underlease

of part of the premises) to a company, and there was no evidence that the proposed assignees were other than respectable and responsible. The head landlords, however, refused to consent to the assignment, unless the proposed assignees entered into a covenant with the head landlords that they would not assign, underlet or consent to any parting with possession or sharing of the premises, and that they would not consent to their under-tenants assigning, underletting or parting with possession of or sharing the premises. The sub-landlords were prepared to grant the necessary licence, but only subject to the consent of the head landlords. Wynn-Parry J. held (following *Re Gibbs and Houlder Brothers & Co., Ltd.'s Lease* [1925] Ch. 575) that the refusal of consent by the head landlords was unreasonable; but he declined to grant a declaration to that effect against the head landlords, since they had not been made parties to the summons by either the sub-landlords (under third party procedure) or the sub-tenants. But he also held that, since the head landlords had (as he held) unreasonably refused their consent, the continued refusal of consent by the sub-landlords was also unreasonable: and against the sub-landlords he granted a declaration to that effect.

Bewlay (Tobacconists), Ltd. v. *British Bata Shoe Co., Ltd.*
[1959] 1 W.L.R. 45; [1958] 3 All E.R. 652 (C.A.)

Landlord and Tenant Act, 1954—*business premises—recovery of possession—landlord's intention to demolish or reconstruct.*—Section 30 (1) (f) of the Landlord and Tenant Act, 1954, has again been considered by the Court of Appeal. The landlords in this case, who also owned (and occupied) premises adjoining those which they had let to the tenants, resisted an application by the tenants for a new tenancy on the ground that they intended to carry out substantial reconstruction on both sites. The proposed work included, in addition to two minor items of demolition and reconstruction not in themselves substantial, (1) reconstruction of an entirely new shop-front on the tenants' premises and abolition of the existing means of access from the street, and (2) removal of a large part of the dividing wall. The county court judge, relying mainly on the alterations to the shop-front and the dividing wall, held that the work did involve both demolition and reconstruction of a substantial part of the premises, and the Court of Appeal upheld his decision. A county court judge is entitled, in the view of Lord Evershed M.R. (with whom both the other members of the court agreed), "to look at the totality of what is proposed to be done and, as a matter of fact and common sense, to ask himself the question whether those proposals involve the demolition or reconstruction of a substantial part of the premises or the carrying out of substantial reconstruction on them." In the present case there was clearly evidence to justify the learned judge's conclusion.

It had been argued in support of the tenant's appeal that in cases where (1) the proposed work involves some demolition and some construction or reconstruction, and (2) the demolition by itself is not

of a substantial part, and (3) the construction or reconstruction does not involve construction or reconstruction on or of a substantial part, then the landlord cannot bring his case within section 30 (1) (f) by showing that the parts demolished and the parts affected by the proposed construction or reconstruction will together add up to a substantial part of the premises. In the circumstances of the present case, however, it was found unnecessary to express any opinion on this point, which was expressly left open. Both the demolition of the dividing wall and the reconstruction of the shop front could, in this case, be considered substantial.

It seems, however, that the mere substitution of one shop-front for another of a similar kind might not be " reconstruction " within section 30 (1) (f). And Sellers L.J. also observed that the construction of a shop-front might be expensive, elaborate and substantial in relation to the whole of the premises, but still outside the terms of section 30 (1) (f), since the work might reasonably be done without obtaining possession of the holding. But in the present case possession was essential.

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6. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

(*Note*:—Where a case is not reported in any of the general series of law reports, it is cited from *Taxation Reports* (T.R.) or the periodical *Taxation* (Taxation).)

Housden v. *Marshall*
[1959] 1 W.L.R. 1; [1958] 3 All E.R. 639 (Ch.D.)

Income Tax—Reward for Services—Sale of Property

Statutory provision: Income Tax Act, 1952, s. 123, Case VI of Schedule D.

Point: A reward for the performance of services, even though there is some incidental sale of property and despite the services being but slight, is a proper subject of tax under Case VI of Schedule D. This was clearly enunciated by Upjohn J. in *Bradbury* v. *Arnold* (1957) 37 T.C. 665, when he stated (at 37 T.C. p. 669) " There is no doubt that a contract for services may, and clearly does, form a matter for assessment under Case VI of Schedule D, and not the less so that the services to be rendered are trivial, or that they are to be rendered once and for all, so that the remuneration may be regarded as a casual profit arising out of a single and isolated transaction." On the other hand, a sale of property where there is incidentally some service involved gives rise to a capital or non-taxable receipt unless trading takes place (*cf. Trustees of Earl Haig* v. *C. I. R.*, 1937 S.C. 676). Upon which side of the line any particular case falls apparently depends not upon the amount of the services rendered, but upon

whether they are themselves the subject-matter in respect of which consideration is given rather than being merely necessary for facilitating the transfer of property.

Facts and Decision: A jockey agreed to make available to a ghost writer reminiscences of his life and experiences on the turf so that the ghost writer might produce four articles for a newspaper. He undertook to place at the disposal of the ghost writer documents, photographs, etc. The jockey did not write the articles and in fact merely vetted the information which the writer found by his own research. As a term of the agreement, however, the jockey allowed a facsimile of his signature to be used on the only article which was in fact published. The Crown claimed tax upon a sum of £750 paid to the jockey in respect of the one article, but the Special Commissioners found that the transaction amounted to the sale of publication rights in the reminiscences of the jockey. The Crown appealed.

Held: The £750 was taxable as being remuneration for services rendered. Such sale of property as there was was merely incidental for, apart from the right granted to use his signature, the jockey parted with no property. The copyright in the article belonged to the writer or his employer and the information imparted was already public property. Harman summarised the position (at [1959] 1 W.L.R. p. 7) as follows:

> "He did not sell any publication rights in his reminiscences; he had no reminiscences of which he could sell the rights. The reminiscences which he communicated to the journalist, if they had been used, which, actually, they were not, were not his. He had no secrets to impart, his life was open."

C. I. R. v. *Hinchy* [1959] 2 W.L.R. 32; [1958] 3 All E.R. 682 (Q.B.D.)

Income Tax—Incorrect return—Penalty

Statutory Provision: Income Tax Act, 1952, s. 25 (3) (a).

Point: By the Income Tax Act, 1952, s. 25 (3) (a) "a person who neglects or refuses to deliver, within the time limited in any notice served on him, or wilfully makes delay in delivering, a true and correct list, declaration, statement or return which he is required under the preceding provisions of this Chapter to deliver shall . . . (a) if proceeded against by action in any court, forfeit the sum of £20 and treble the tax which he ought to be charged under this Act . . ." The "tax which he ought to be charged under this Act" must be distinguished from the tax which he ought to *have been* charged. It does not refer to the whole tax payable by the taxpayer on his income for the relevant period but to the tax not assessed at the date upon which the proceedings are brought. Normally therefore the maximum penalty would be three times the additional tax payable by reason of the omission made in the return.

Facts and decision: The taxpayer returned the interest on his Post Office Savings Bank account for the year ending April 5, 1952,

at a sum of £18, where the true figure was £51. This understatement having been discovered from sources other than the taxpayer, an additional assessment was made in 1955 for tax at the standard rate on the difference between the true interest and that returned. Later the Commissioners brought an action claiming a £20 fixed penalty and also " treble the tax which he ought to be charged under this Act," which latter figure the Commissioners contended was three times the total income tax of the taxpayer for the year 1952–53.

Held: That the £20 penalty was recoverable, but no further sum. At the date when action was brought there remained no tax to be charged, the taxpayer by then having been assessed in respect of the whole of his income for the relevant period.

Carson v. *Cheyney's Executor*
[1958] 3 W.L.R. 740; [1958] 3 All E.R. 573 (H.L.)

Income tax—Death of author—Royalties received after death

Statutory provisions: Income Tax Act, 1918, Sched. D, Cases II, III, V and VI (now Income Tax Act, 1952, s. 123).

Point: The House of Lords has unanimously upheld the decision of the Court of Appeal (noted *ante*, Vol. 22, pp. 72–73, where the facts are fully set out), that receipts by an author's executors from contracts under which he exploited his works during his life are not taxable. The author was taxable under Case II of Schedule D, during his life on a receipts basis; in consequence, whether he received payments for writing or royalties from exploitation of his copyrights, such receipts were included in the Case II assessment. The Crown argued that after his death the copyright formed a " source " from which income flowed taxable under Case III. Alternatively, the Revenue argued that Case VI applied or in the one instance, where foreign royalties were concerned, Case V.

In rejecting the Revenue claim the case was considered indistinguishable from *Stainer's Executors* v. *Purchase* [1952] A.C. 280, where the receipts accruing to the executors of the late Leslie Howard from contracts entered into by him prior to his death were held to be untaxable, the contracts being the machinery of payment and not the source. Jenkins L.J. in that case said (at [1951] 2 All E.R. 1071) " I think it is equally clear that the assessment to tax of the profits of a profession under Case II of Schedule D down to the date of discontinuance is to be taken as covering all remuneration earned in the course of such profession, whether received prior to or after such discontinuance and that, the liability to tax being thus exhausted as far as remuneration is concerned, nothing which is in truth remuneration so earned can afterwards be charged to tax merely because the mode of ascertaining and paying it is such that it might have been charged to tax under some other case if it had not been remuneration so earned." Adopting this last quotation, Viscount Simonds (at [1958] 3 W.L.R. 744) stated " Payments which are in historical fact . . . exclusively the fruit or aftermath of professional activities do not change their taxable

character when the profession is discontinued." His Lordship later expressed the same point forcibly in rejecting the idea that some new income-bearing asset had been brought into being (at pp. 744 and 745) —"What else were these payments than the fruit of Peter Cheyney's professional activities? How is it relevant that in order to reap his harvest he had to enter into contracts under which he acquired rights and incurred obligations as did the publishers with whom he contracted? And how is it relevant that it was a term of those contracts that there should be vested in the publishers a right created by the law to protect him in the exploitation of his work? It was by entering into such contracts that he was able to carry on his profession gainfully . . . first and last and all the time the payments are professional earnings, whatever be the mechanism through which they are paid."

The apparent escape from taxation of some income is, of course, caused by the system of taxation upon a receipts basis. If the Crown wish to tax all the receipts of an author it will be necessary to legislate but the simple expedient of providing for returns on the earnings basis will be likely to prove an impossibility or at least lead to a greater loss of tax than the use of the receipts basis. There would appear to be no reason why authors should be singled out for particular legislation due to the circumstance of their bringing into being a property in the form of copyright; let us hope such a course is not attempted.

Barclays Bank, Ltd. v. *C. I. R.* (1958) 62 Taxation 279 (Ch.D.)

Estate duty—Assets valuation—Control

Statutory provisions: Finance Act, 1894, s. 7 (5); Finance Act, 1940, ss. 55–58.

Point: For an assets valuation to be automatically applicable to the shares and debentures passing upon the death, it is necessary that the deceased should have had at some time during the five years immediately preceding his death individual control of the company or a power to obtain that control. Notional control by reference to the powers and capital or income interests in the company of the deceased may in certain circumstances give rise to an assets valuation under section 29, Finance Act, 1954, but such attraction of the assets valuation was not relevant here. Thus, when looking at voting control it is necessary to look only at the votes held by the deceased himself or controlled by him. Where the deceased was one of a number of trustees jointly holding shares, the votes incident to such shares cannot be credited to him whether he be first-named trustee or otherwise. The report at present available implies that the joint holding of itself was sufficient to prevent the votes being credited to the deceased rather than the existence of a fiduciary capacity; presumably therefore the fiduciary capacity was self-imposed.

Facts and decision: The deceased left shares in a private company which amounted only to a minority interest. At the date of his death, however, he was one of four trustees holding shares in the company, which shares if added to his own would have amounted to more than

half the issued share capital. The deceased was not beneficially interested under the terms of the trust, but the trust holding was registered in the company's register with the deceased's name appearing first. Voting in respect of joint holdings of shares was, in the usual way, directed by the company's articles to be by the vote of the senior by order of registration, who tendered a vote. The Crown claimed duty on the shares owned by the deceased and passing on his death valued on the assets basis under section 55, Finance Act, 1940.

Held: The deceased did not have individual control of the company. The deceased was only one of four trustees and the use of trust votes is, of course, a matter for the trustees jointly and not individually. Comparison may be made with the case of ascertaining whether a company is controlled by its directors or not as in *C. I. R.* v. *J. Bibby & Sons, Ltd.* [1945] 1 All E.R. 667, where votes held as a trustee are included.

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7. *PLANNING CASES*

By V. G. Wellings, M.A.(oxon), Barrister-at-Law

London County Council v. *Central Land Board* [1958] 2 W.L.R. 807; [1958] 1 All E.R. 806 (Chancery Division, Danckwerts J.); [1958] 1 W.L.R. 1296; [1958] 3 All E.R. 676 (C.A.)

Development charge.—Permission to develop 231 acres as a housing estate was granted in 1949. The development was carried out prior to November 18, 1952 (the last material date for the purposes of the development charge). The greater part of the land was suitable for building purposes but a portion of it was not. In fact the cost incurred by the council in relation to the unfit portion was considerably in excess of the value of the land as a whole for building purposes. The council therefore contended that there ought to be no development charge. The Board, however, proceeded on the basis that the permission benefited the good land only and that the poor land was to be ignored and assessed a charge of £22,500. *Held, per* Danckwerts J., that for the purposes of section 70 (2) of the Act of 1947 regard had to be had, when assessing the increase in the value of the land attributable to the permission, to the entirety of the land to which the permission related. The fact that the expenditure needed to render some of the land fit for development exceeded the value of the land as a whole with the benefit of permission rendered such an increase nugatory. Accordingly, no development charge was payable. This decision was affirmed in the Court of Appeal, it being stated in the judgment of the court that the development charge was to be assessed on the basis that the whole of the operations permitted would in fact be carried out.

([1958] J.P.L. 515)

Rigden v. *Whitstable U.D.C.* [1958] 3 W.L.R. 205; [1958] 2 All E.R. 730 (Chancery Division, Danckwerts J.)

Originating summons for declaration that enforcement notice invalid —wrong originating process. An originating summons asking for a declaration that an enforcement notice was invalid was dismissed on the grounds that the recipient was not a person "interested under a deed, will or other instrument" within the meaning of R.S.C., Ord. 54A, r. 1, since he could not really be interested under a notice; he was merely interested in contesting its validity; nor was he claiming "any legal or equitable right" depending upon a question of the construction of a statute within Ord. 54A, r. 1A. It is unfortunate that in the High Court there is no rule, corresponding to Ord. 6, r. 7, of the County Court Rules, to enable proceedings commenced by originating summons to be treated, where they should have been commenced by writ (as here), as though they were commenced in proper form. Thus it is still true that "the forms of action we have buried; but they rule us from their graves."

([1958] J.P.L. 664)

Sunbury-on-Thames U.D.C. v. *Mann* (1958) 56 L.G.R. 235 (D.C.)

Permission for a particular use of land—new temporary building erected for maintenance and repair work—G.D.O., 1950, Class IV.— Planning permission was granted for the "continued use" of certain land and buildings as yard, workshop and stores. Subsequently the occupier erected a new building on the site larger than any existing building and constructed of breeze slabs and steel joists for use in connection with the maintenance and repair of engineering equipment. The planning authority served an enforcement notice requiring the new building to be pulled down. The occupier appealed and the justices held that the building came within Class IV, para. 1, of Schedule I to the General Development Order, 1950. The court held that the scheme of the Act of 1947 was to distinguish between the use of land and operations in or over land. Therefore, as the occupier had planning permission for a use only of his land, this did not involve the operation of building and, accordingly, he could not bring himself within Class IV, para. 1, of Schedule I to the Order, which applied only to buildings needed for permitted *operations*. See the commentary to this case in [1958] J.P.L. 665–666.

R. v. *Minister of Housing and Local Government, ex p. Rank Organisation, Ltd.* [1958] 1 W.L.R. 1093; [1958] 3 All E.R. 322 (D.C.)

Purchase notice—Minister's powers.—The owners of a site bordering a main trunk road were refused permission to develop the site by erecting shops with living accommodation over, and they served on the

local planning authority a purchase notice under section 19 of the Act of 1947. The Minister refused to confirm the notice. He took the view that the land could be rendered capable of reasonably beneficial use by the carrying out of development for residential purposes and, purporting to exercise his powers under proviso (b) to section 19 (2), directed that planning permission for residential development be granted if applied for. On an application for an order of certiorari to quash the Minister's decision, it was held that section 19 (2A) applied to the whole of the preceding subsection including proviso (b) and since residential development did not come within the Third Schedule to the Act of 1947, the Minister's decision was invalid and had to be quashed. Section 19 (2A) was added by section 70 of the Act of 1954.

([1958] J.P.L. 889)

THE LIBRARY

Cheshire's Modern Real Property. 8th ed. By G. C. Cheshire, D.C.L., F.B.A., Barrister-at-Law, formerly Vinerian Professor of English Law in the University of Oxford, with an Appendix on the Rent Acts by J. B. Butterworth, M.A., Fellow and Bursar of New College, Oxford. London: Butterworth & Co. (Publishers) Ltd. 1958. lxi, 837, (Appendix) 83 and (index) 55 pp. (£2 15s. net.)

When the previous edition of Cheshire's *Modern Real Property* was published, this reviewer ventured respectfully to commend the freshness and originality of mind which had induced the author to remodel his established textbook in the interests of students (*ante*, Vol. 19, p. 76). The same sentiment must be the keynote of the present review. Dr. Cheshire reveals (Preface, p. v) that the principal changes in this edition have been made after further thought to the same end, and also after correspondence with Professor A. D. Hargreaves, whose article "Modern Real Property" in the *Modern Law Review* (Vol. 19, p. 14) was both a review and a study of the whole problem of teaching real property. The principal changes in this edition are the transfer of the discussion of the statutory powers of a tenant for life and trustees for sale, which formerly appeared in the chapter on beneficial interests, to the chapter on estate ownership, and the removal of detailed discussion of vesting deeds, etc., to the section on conveyancing. This rearrangement should be welcomed. Students always seem to find much difficulty in appreciating the dual position of the tenant for life under the Settled Land Act, and they should be helped by the new plan. Moreover, it is logical to deal with the statutory powers while discussing the legal estate to which they are annexed. Some other less important alterations have been made. In the accounts of the doctrine of estates (pp. 27–36), conveyancing (pp. 637–638) and the Statutes of Limitation (pp. 784, 800, 801) more emphasis has been placed on possession and less on ownership. The section on licences (pp. 456–460) has been expanded, and a more cautious attitude to its juridical nature adopted in view of the recent cases. Eleven pages (pp. 377–388) are now given to security of tenure; most of these are concerned with business tenancies, since the Rent Acts (including the Act of 1957) are fully covered in the Appendix. In future editions it may be desirable to consider whether the Appendix in its present form is still justified, for the centre of legal interest and development now seems to be shifting to business tenancies. In other respects the book is substantially unchanged, though of course recent cases have been incorporated and a number of minor amendments made to the text.

Attention may be drawn to a few points. *Halsall* v. *Brizell* [1957] Ch. 169 is not cited on positive covenants, and the chapter on powers would, it is suggested, benefit from the addition of an analysis of the nature of mixed or hybrid powers. At p. 112 the example should, from the context, be one of a determinable fee but in fact is a fee simple upon condition (to A in fee simple but if he become entitled to Blackacre then to B in fee simple). At pp. 138–139 and 157–158 the student is given outlines of the traditional real and personalty settlements without being told that modern taxation has caused substantial remodelling, especially of the strict settlement.

Generally, however, Cheshire's *Modern Real Property* has the fully deserved prospect of retaining its eminent position as a leading textbook for students, practitioners, and, on occasion, the courts. It is, indeed, sufficient to say that the new edition emulates its predecessors.

F. R. Crane.

Wurtzburg's Building Society Law. 11th ed. By JOHN MILLS, O.B.E., B.A., Barrister-at-Law, assisted by BRYAN J. H. CLAUSON, Barrister-at-Law. London: Stevens & Sons, Ltd. xxxvi, 444 and (index) 22 pp. (£2 10s. net.)

Wurtzburg contains 290 pages of text, followed by an appendix of 154 pages reproducing the Building Society Acts, Statutory Rules and Regulations, with statements of account and other forms and a model set of rules for a society. Mortgages as such are dealt with in pp. 95–181. Consequently Wurtzburg must not be regarded as a conveyancer's book dealing with building society mortgages, as may be further illustrated by the fact that only section 115 and the Third Schedule of the Law of Property Act, 1925, are included in the Appendix. Conveyancers as such are likely to find the usual conveyancing book, or specialist works such as Waldock on *Mortgages*, more suitable for their purposes. Nevertheless there are plenty of useful points in Wurtzburg—for example, the summary of the differences between building society and other mortgages (pp. 95–96), the emphasis that the desirability of mortgages on flats is a matter of business rather than law (pp. 100–102) and the discussion of the attornment clause (pp. 130–132). On the other hand, the discussion of the "tenancy by estoppel" cases (pp. 125–126) is merely a bald two-line statement of the facts, with the comment "The tenant won" or "The building society won." This section ought to be considerably expanded or reduced to a reference to discussions elsewhere.

The above remarks, however, concern Wurtzburg regarded simply as a tool for the conveyancer. This is not, however, the editors' intention, for Wurtzburg is a book about Building Societies—a discussion of the whole law applicable to them. Any practitioner who has to act for a building society beyond mere mortgaging, or whose client gets into a dispute that involves interpretation of the society's constitution or rules, will find Wurtzburg of the greatest value. Indeed, reading or reference to the book provides much background to the everyday mortgage, and could well be read for that reason. Moreover, Wurtzburg is not designed simply, or even perhaps primarily, for legal practitioners. It is intended also to be a textbook and handbook for officials and others concerned with the running of the societies, and such readers should be very well served by this edition as by its predecessors. Any book with a life of seventy-two years and eleven editions must have much to recommend it, and the present edition should amply maintain the reputation of the work.

F. R. C.

The Discharge and Modification of Restrictive Covenants. By G. H. NEWSOM, Q.C. Sweet & Maxwell, Ltd. lxv, 411 and (index) 4 pp. (£2 5s.)

This is a volume of reports on the discharge and modification of restrictive convenants. First, there is a general commentary by the author which has already appeared in the *Conveyancer* (Vol. 20, 477, and Vol. 21, 6). The main text consists of 275 pages of Lands Tribunal decisions and 111 pages of High Court and Court of Appeal decisions from 1926 to the latest, *Driscoll* v. *Church Commissioners* [1957] 1 Q.B. 330. This is followed by appendices giving the relevant statutory provisions and regulations.

The number of applications under the Law of Property Act, 1925, s. 84, since the war has shown that the subject is one of considerable practical importance, and the work is widely spread over the profession. It has not been easy for a solicitor to discover the sort of reception an application will be met with and whether the cost will be formidable. This work

provides the essential material which will enable a proper assessment to be made and advice given, so that the practitioner may leave the realm of sheer guesswork. The reports give the orders as to costs which are of considerable assistance.

It is not too much to say that he would be a very rash person who would prepare a case under the section without the assistance of this volume. The reduction of Lands Tribunal decisions to a coherent selection must have been a rather forbidding task, but the author can be satisfied that he has added another work of scholarship and practical utility to the English lawyer's library.

E. F. G.

Business Lettings. By Professor Dennis Lloyd, M.A., LL.B., Barrister-at-Law, and John Montgomerie, B.A., Barrister-at-Law. Butterworth & Co., Ltd. liii and 374 pp. (£2 10s.)

This is a stimulating, readable and remarkably comprehensive book. The longest chapter, Chapter VI, deals with security of tenure under Part II of the Landlord and Tenant Act, 1954, but the book is in no sense a specialist work dealing only with this subject. It reviews a very wide range of the law of landlord and tenant as it affects business lettings, and in general it does this, according to the authors, in answer to the question, "What should the landlord or tenant do in particular circumstances?"

The result is a most helpful and practical work. Thus, Chapter 1 is entitled "Legal suitability of premises," and deals with those questions which a legal adviser should ask when it is proposed to take a lease of business premises, *i.e.*, those arising from title, restrictive covenants, common law, nuisance, town and country planning, and public health matters. On pp. 29–30 the questions are summarised in a form which should prove very useful to the practitioner as a guide and a check. Chapter II deals with the form of agreement. In addition to a summary of the more usual matters, there are sections dealing with important, but often neglected, subjects; for example, the practical consequences of the distinction between a licence and a tenancy, and tax questions as they affect both lessor and lessee on the payment of a premium. There follow chapters dealing with parties, covenants and assignment and devolution. The explanation of the cases centering round *Lister* v. *Lane and Nesham* [1893] 2 Q.B. 212 dealing with how far repair includes renewal is particularly neat. The authors seem to share the coolness for the decision in *Taylor* v. *Webb* [1937] 2 K.B. 283 expressed by other learned writers, but it is typical of the book that they do not spend time discussing whether it was rightly decided but rather explain its logical consequences.

Chapter VI dealing with security of tenure is well laid out, and thorough. Its defects arise inevitably from the large number of cases reported during the last year. It must be as difficult writing on this subject today as it was on the Rent Acts a few years ago. Thus, many cases of major importance have been inserted in footnotes, while others are already out of date. For example, *Wheeler* v. *Mercer* [1955] 3 W.L.R. 714 and *Betty's Cafés* v. *Phillips, Ltd.* [1956] 1 W.L.R. 678 have been reversed on appeal. But for the reader prepared to do a little preliminary annotation the chapter will be sound and useful.

There follow chapters on dilapidations, on improvements and on leases of special properties. This includes rent controlled properties and discusses business lettings at less than two-thirds the rateable value which are not protected at all. It does not, however, say that a tenant occupying a dwelling-house which includes business premises, for a term exceeding twenty-one years at a rent of less than two-thirds the rateable value, will normally be protected under Part I of the Landlord and Tenant Act, 1954.

The appendices include the relevant statutes, orders and forms and some very interesting conveyancing precedents which suggest some new forms for traditional covenants. The book is pleasantly printed and the index is reasonably adequate.

D. K.

Principles and Practice of Planning, Compulsory Purchase and Rating Law. By M. R. R. DAVIES, PH.D., LL.M., D.P.A., Barrister-at-Law. Butterworth & Co. 293 plus (indices) 72 pp. (£2)

Planning and compulsory acquisition—the fiction of a "purchase" is surely outmoded—are accustomed to sharing a textbook, but it is a trifle odd to find rating law being dealt with at the same time. The learned author attempts to justify this unholy partnership by suggesting that the three subjects (with the allied "practice before the Lands Tribunal") have become of such great practical importance as shortly to demand a fresh approach to the study and teaching of the law of real property. Whilst we agree that the "far-reaching powers of modern public authorities" cannot be overrated in importance, we would suggest that the subjects dealt with in this book are but four of several branches of this new body of jurisprudence—to mention but one other, the powers of local sanitary authorities under the Public Health Acts are of the very first importance.

However, where the learned author does succeed in justifying his book, is in suggesting that it neatly fits the syllabus for "Optional Paper Group B (8)" in the Law Society's Final Examination. To those whose misfortune it is so to study this strange hotchpotch, we can confidently and unreservedly recommend this book; there is, indeed, no single rival.

The book is, perhaps understandably and we think justifiably, divided into unequal parts, planning law taking up 150 pages, compulsory acquisition just over 50 pages, rating law 70 pages, and Lands Tribunal practice 15 pages. The treatment is in narrative form, well broken up with headings and sub-headings, and where he is dealing with planning law, the learned author follows as nearly as convenient the order of the 1947 Act. His language is clear, but at times he seems to descend too much to details, for example, where he deals with the Use Classes Order and the Classes of Permitted Development (in Chapter 2). In Chapter 3, more interesting appeal decisions than some of those cited from the Bulletins of Selected Appeal Decisions could have been found in the pages of the *Journal of Planning and Property Law*.

On the subject of compulsory purchase orders, in Chapter 9, the learned author has made an analysis of all the leading cases, including long extracts from many of the judgments; probably a very wise step in a book which will primarily be of value to students. The section on rating law is not perhaps as full as the others, but a very large number of decisions has been noted in a comparatively small space; we particularly welcome the summary at pages 244 *et seq.*, of decisions on industrial de-rating. If this vexed question is not shortly "legislated" out of existence, this summary will be most useful for many practical lawyers. At page 261, we would have expected some comment on the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1), under which a moratorium on any increase of rates as a consequence of the new valuation lists is imposed in favour of certain (or should it be "uncertain"?) charitable hereditaments, for a period of three (or possibly five!) years; this section is proving most difficult of application in practice.

One habit of the learned author we found a trifle irritating, namely his extensive use of italics for the purpose of emphasis. We have been unable to find any inaccuracies of substance or detail, and the book is extremely well

equipped with an extensive table of contents and the usual indices. On the general principles of administrative law, the learned author is of the opinion, which will be shared by many, that the traditional powers of the courts to grant remedies in cases where injustice has been or may be done, are often severely curtailed by statute. This point is well brought out in several passages in this book, although we are by no means sure that we agree with the suggestion (on p. 178) that the courts should be allowed "to prescribe appropriate standards of administrative reasonableness." Surely the Minister, answerable to Parliament, alone must be entrusted with the policy decision as to whether (*e.g.*) in the country's interest a piece of land should be used for housing or for agriculture? If the courts are to be given control over the exercise of governmental statutory powers generally, we would suggest that a new hierarchy of courts (with preferably the same standing as the present county courts, High Court, and Court of Appeal) would have to be established.

A great deal of industry and thought has obviously gone into the writing of this book, and within the strange compass set by the title, we think it adequately meets the demand expressed in the preface to exist for a comprehensive account of the principles and practice of the law relating to these subjects. As suggested in the Law Society's syllabus, the book throughout deals with the four subjects from the point of view of the general public, rather than that of the public authority.

J. F. G.

The Complete Guide to the Rent Acts. By Lionel A. Blundell and V. G. Wellings, Barristers-at-Law. London: Sweet & Maxwell, Ltd. li, 494 and (index) 20 pp. (£2 2s. net.)

This comprehensive work on the Rent Acts, by authors whose names are a hallmark of quality, will be widely welcomed by the legal profession as well as by those others, such as estate agents and property managers, who need daily to apply an accurate knowledge of this branch of the law to the facts of life. The authors have carried out their difficult task with their usual high standard of care and knowledge—readers who are familiar with the authors' other books will know that there can be no better recommendation. The book includes the text and an exposition of the Landlord and Tenant (Temporary Provisions) Act, 1958. It is, therefore, a completely up-to-date treatise.

What an appallingly complicated patchwork the Rent Acts still are! Despite the Rent Act, 1957, the old law cannot be jettisoned. It is still necessary, where premises are not excluded from control by the 1957 Act, to have regard to the general provisions of the Rent Acts to determine whether they are controlled. Further, the old recoverable rent may be operative where it exceeds the rent limit calculated as a multiple of gross value, and, again, a certificate of disrepair may cause a reversion to the old recoverable rent. Thus, the basis of the rent which can be demanded may still be an old standard rent which has its origins in the dim past and is determined according to the rules of 1920 Act control. There are a variety of special rules to be kept in mind in regard to such matters as statutory tenancies under Part I of the Landlord and Tenant Act, 1954; Crown lettings; exempted public authorities; subsidised private houses; transactions under the Housing Act, 1952; statutory tenancies under the Requisitioned Houses and Housing (Amendment) Act, 1955; remnants of the 1946 and 1949 Acts; and so on. The authors have fitted the patchwork together with great skill. It is a striking reminder of the difficulty and complexity of some of the existing provisions to find authors of such experience and learning saying in a footnote on page 211 (in connection with Part I of the Landlord and Tenant Act, 1954) that they "hope that they

have understood these provisions aright, but confess to some difficulty in tracing a course through this particular labyrinth."

When a book has been as well written as this one has, a reviewer has to scrape the barrel for those attempts at criticism which show, if they do nothing else, that he has in fact read the book through. A possible point might be made about the arrangement. Was there not something to be said for putting together all the old law which may still be required in a separate Part at the beginning? Should the reference to a tenancy at a low rent on the last line of page 202 not be deleted? Minor clerical errors which have been noticed are the word "control" for "decontrol" in the ninth line from the bottom of page 36 and the absence of a "not" after "dwelling-house" in line 8 of section 188 (A) on page 221.

J. M. W.

A Guide to Land Registry Practice. 8th ed. By JOHN J. WONTNER. London: The Solicitors' Law Stationery Society, Ltd. vii and 171 pp. (23s. 6d. net.)

When *Wontner* was first published, London and Eastbourne were the only areas of compulsory registration. Today, the Land Registry handles nearly a quarter of all conveyancing in the country and *Wontner* remains, as it has long been, an elementary and simple guide to the solicitor's clerk who is not familiar with the normal everyday practice of registered conveyancing. This new edition has been prepared with the assistance of Mr. C. W. K. Donaldson, a solicitor in the Registry, who may well have been responsible for pruning out some errors in the last edition. At all events there is now a correct statement of the circumstances in which it is necessary to register the title to leases. Useful new information, founded upon official sources, is given about the registration of rentcharges, about official searches, and about the development of building estates and there is a summary of the Registry's practice (arising out of the decision in *Lee* v. *Barrey* [1957] Ch. 251) when deeds presented for registration contain inaccurate plans. Perhaps the mere dozen lines on adverse possession (p. 45) scarcely justify their existence and, on the other hand, the devotion of twenty-two pages to the printing of common forms which most people buy from the Stationery Office is of dubious value, although the space expended on them is far less than in the previous edition. Finally, there is an odd footnote on page 36 which seems to your reviewer to imply that applications for first registration do not require the signature of a solicitor. It is, of course, axiomatic that they do. But these minor criticisms must not be read as detracting from the general excellence of this new edition of the *Guide* which bears a more impressive hall-mark of authority than formerly.

T. B. F. R.

Controls on Company Finance. By B. J. SIMS, LL.B., Solicitor. London: Sweet & Maxwell, Ltd. xvi, 137 and (index) 7 pp. (£1 5s. net.)

It is not usually a fair criticism of a book to complain of the limits of the subject chosen by the author, but it is unfortunate that Mr. Sims has confined himself to companies. The main part of the text deals with control of borrowing, and builders and other business men trading on their own account, as well as companies, need guidance. The subject is not an easy one and there is comparatively little literature on it, and any guiding light is to be welcomed. Nevertheless, we have the feeling that Mr. Sims could have done much better. Mr. Dworkin in his article on "The Control of Borrowing," *The Conveyancer* (1958), Vol. 22, at p. 189, covered certain

parts of the subject in great detail. There is neither reference to the article, nor any fresh examination of the ground covered. Nor, to take another illustration, does Mr. Sims tell us what his view is when a company decides to reduce capital and then issue redeemable preference shares: is consent of the capital issues committee required or not? In short, though we do not complain of what the author actually says, we think he could have given us a much more helpful book.

Some parts of the book, for example, on exchange control, seem likely to prove only of passing interest, but it is reasonably probable that controls on borrowing and transfers of assets abroad will remain with us for some considerable time. If this proves to be so, we hope that the author will consider giving us a much more thorough examination of the subject.

E. F. G.

We have also received:—

Solicitors' Guide to Development and Planning. Second edition. Supplement. By R. N. D. Hamilton, ll.b., Solicitor, Deputy Clerk of the Buckinghamshire County Council. Solicitors' Law Stationery Society, Ltd. (3s. 6d.)